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Legal opinion on Draft Amendments to Select Legislative Acts of Ukraine Relating to the Implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)

UKRAINE

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Based on an unofficial English translation of the Draft Law.



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*This Opinion is also available in Ukrainian.
However, the English version remains the only official version of the document.*

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

[The Draft Amendments to Select Legislative Acts of Ukraine aim to incorporate provisions from the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (hereinafter the “Draft Amendments”). OSCE/ODIHR welcomes the initiative to implement such legislation and, if passed, the Draft Amendments would positively implement several provisions of the Convention and improve the relevant legislative framework of Ukraine.

On the other hand, Ukraine has an opportunity to further improve its legislative framework to protect children from sexual exploitation and sexual abuse, by including provisions from not only the Lanzarote Convention, but also from other relevant international sources to which Ukraine is a State Party and further relevant legal sources, including the United Nations Convention on the Rights of the Child (UNCRC); and notably the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography; Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000); Council of Europe Convention on Action against Trafficking; OSCE Commitments; and European Union Legislation.

More specifically, OSCE/ODIHR makes the following recommendations to further enhance the Draft Law:

- A.** In the Draft Amendments: Extend protection against sexual exploitation and sexual abuse to all persons below 18 years of age by defining children as persons under this age, in particular introducing a higher age limit in Articles 155, para 2, 156¹, 301¹ and 301²; Ensure that sexual abuse or sexual exploitation of a child using of force, coercion, and threats, abuse of position of vulnerability and particularly vulnerable circumstances such as disability and situation of dependence, is introduced in the Criminal Code and/or defined as an aggravated crime.

[see paras 21-23];

- B.** Where appropriate, consider replacing the term “child pornography” with “child sexual abuse materials”, or “sexual exploitation of children”. All forms of commercial child exploitation should be criminalised. Include provisions to address sexual exploitation and sexual abuse of children online, including Child Sex Abuse Material CSAM (including virtual CSAM). [see paras 24-25];
- C.** Ensure compliance with national and international data protection and privacy frameworks when establishing and operating a Child Sex Offenders’ Register [see para 26];
- D.** Clarify in Article 301¹ of the Draft Amendments all forms of CSAM and CSE could take including film, DVD, CD-ROM, diskette, CD-R, and other electronic media and devices including computers, tablets and mobile phones [See para 28];
- E.** Add provisions on “profiting from or otherwise exploiting a child for such purposes including all forms of child commercial exploitations” for complete fulfilment of obligations in Article 21 of the Lanzarote Convention. [See paras 31- 33];
- F.** Include provisions on the possibility to take into account previous convictions imposed by other State Parties to the Lanzarote Convention. In line with Article 29 of the Convention. [See para 35];
- G.** Introduce concrete legal provisions within the Draft Amendments ensuring that legal persons can be held liable, as per Article 26 of the Lanzarote Convention. [See para 38];
- H.** Include clear and distinct wording for awareness raising activities related to sexual abuse and exploitation, in particular for those who come in regular contact with children. [See paras 47-48];

- I.** Training provisions should incorporate the principle of protection of victim's rights throughout the entire identification and rehabilitation procedure. Furthermore, particular gender needs of child victims and the rights of the child should be a primary consideration in the development of suitable capacity building sessions for each interested group, with particular focus on the principle of non-discrimination and particularities in identification of girl and boy victims and assistance with a view of non-discrimination [See paras 47-48];
- J.** Include a clause criminalising the circulation of material advertising *the opportunity of* sexual exploitation or abuse [See para 51];
- K.** Additional clauses on preventative (pre-offence) intervention and intervention programmes in the course of or after criminal proceedings should be added (including offender registers), in order for the Draft Amendments to be harmonised with the Lanzarote Convention standards [See paras 54 - 55];
- L.** Develop a data collection system at the national level on the situation of sexual abuse and exploitation of children, while respecting data protection principles [See paras 61-64];
- M.** Ensure non-punishment and non-prosecution of child- victims in case of participation in recruitment or solicitation of other children for CSAM and other forms of child trafficking or exploitation. [See paras 71-72];
- N.** In line with the extensive legal requirements set by the Council of Europe Conventions and the European Court of Human Rights as well as other relevant legal instruments, the national investigation provisions should be amended to include legal provisions to ensure amongst other effective and child sensitive investigations. [See section 4.2]; and
- O.** Include firm legal provisions establishing a presumption of minority in case the age of the child has not been established, and ensuring that criminal investigation can commence without having confirmed the age of

the person when there is reason to believe the person could be a child
[See paras 80 - 81].

Additional recommendations can be found in the text, marked in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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Annex: DRAFT LAW OF UKRAINE

On Amendments to Select Legislative Acts of Ukraine Relating to Implementation of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)

I. INTRODUCTION

1. On 1 June 2020, the Commissioner for Children with the President of Ukraine sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of the Amendments to Select Legislative Acts of Ukraine Relating to the Implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).
2. [On 12 June 2020, OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these Draft Amendments with international human rights standards and OSCE human dimension commitments. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.

II. SCOPE OF REVIEW

3. The scope of this Opinion covers only the Draft Act submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating protection of children against sexual exploitation and sexual abuse.
4. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Amendments. The ensuing recommendations are based on international standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, the OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.
5. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion’s analysis takes into account the potentially different impact of the Draft Act on women and men.¹

¹ See para 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>

6. This Opinion is based on an unofficial English translation of the Draft Amendments commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result. The opinion will be translated into Ukrainian, but the English version will prevail in case of discrepancies.
7. This review does not prevent OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts pertinent to protection of children in Ukraine or related policies and is prepared without prejudice to earlier recommendations or comments.

III. ANALYSIS

1. INTERNATIONAL STANDARDS AND OSCE COMMITMENTS ON SEXUAL EXPLOITATION AND SEXUAL ABUSE OF CHILDREN [...]

1.1. Relevant sources in international law

8. It is widely recognised that sexual exploitation and abuse of children is a particularly heinous human rights violation and a crime. According to UNICEF, approximately 2 million children are exploited by the “sex industry”² each year and there are more than 1 million images of 10-20,000 abused children posted on the internet through child sexual abuse material (CSAM).³ The failure and inadequate identification, lack of identification of these children, as well as the lack of awareness (especially of the use of technology and the internet) and other well-known problems has led the international community to adopt a common and comprehensive approach with particular emphasis on the criminal and human rights aspect of the issue. This approach is reflected in numerous human rights instruments and legal documents, amongst which, the United Nations Convention on the Rights of the Child (UNCRC)⁴, and notably the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography (hereinafter “The Optional Protocol”),⁵ as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime

² UNICEF: “Childhood under threat” <https://www.unicef.org/sowc05/english/povertyissue3.html>

³ CSAM refers to materials depicting acts of sexual abuse and/or focusing on the genitalia of the child. CSAM takes many forms including photos and videos chronicling sexual abuse, live-streaming videos of abuse on-demand, and other “forms of material representing child sex abuse and exploitation, such as audio files, written story lines, or other potential forms of recording.” There is a significant degree of overlap between the markets for CSAM and child sex trafficking; Further information on this aspect can be found at: [https://www.icmec.org/csam-model-legislation/#:~:text=150countries%20have%20refined%20or,CSAM\)%20law%20in%20196%20countries.&text=Require%20Internet%20Service%20Providers%20\(ISPs,or%20to%20some%20other%20agency](https://www.icmec.org/csam-model-legislation/#:~:text=150countries%20have%20refined%20or,CSAM)%20law%20in%20196%20countries.&text=Require%20Internet%20Service%20Providers%20(ISPs,or%20to%20some%20other%20agency).

⁴ Ukraine ratified the Convention of the Rights of the Child on 28 August 1991 (https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en)

⁵ Ukraine ratified the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography in 2003 (<https://indicators.ohchr.org/>)

(hereinafter “The Palermo Protocol”).⁶ The Palermo Protocol explicitly addresses the issue of demand as it requires states to adopt or strengthen legislative or other measures in the educational, social or cultural spheres to discourage the demand that fosters all forms of exploitation of persons, especially women and children. The overall United Nations normative framework provides a solid basis for States’ detailed actions aiming at children’s effective protection including from: inducement or coercion to engage in any unlawful sexual activity; exploitative use in prostitution or other unlawful sexual practices and in pornographic performances and materials; exploitation through the sale and traffic in children for any purpose or in any form; any other form of exploitation that may be prejudicial to any aspects of a child’s welfare. The overall United Nations normative framework provides a solid basis for States’ detailed actions aiming at children’s effective protection including from: inducement or coercion to engage in any unlawful sexual activity; exploitative use in prostitution or other unlawful sexual practices and in pornographic performances and materials; exploitation through the sale and traffic in children for any purpose or in any form; any other form of exploitation that may be prejudicial to any aspects of a child’s welfare. While recognising the critical importance of national action, the UNCRC in Article 4 equally acknowledges the transnational nature of these phenomena, and the need for bilateral and multilateral co-operation to fight impunity and secure children’s development in a safe and protective environment.⁷

1.1.1 Relevant OSCE Sources

9. As an OSCE participating State, Ukraine has committed to follow the main principles of the OSCE Action Plan to Combat Trafficking in Human Beings (hereinafter “the OSCE Action Plan”). The OSCE Action Plan while explicitly referring to the United Nations Palermo Protocol, also commits States to develop and implement National Referral Mechanisms, defined as national cooperative frameworks, through which state actors, in strategic partnership with civil society, fulfil their obligations to protect and promote the human rights of victims of human trafficking, especially children.
10. In addition to the OSCE Action plan, several OSCE decisions/instruments will be referred to throughout the document.⁸

⁶ Ukraine Ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol) on 21 May 2004 (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en#6)

⁷ Santos Pais, M., The United Nations legislative framework for the protection of children from sexual violence including sexual abuse and exploitation, available at: <https://www.coe.int/t/dg3/children/1in5/Source/PublicationSexualViolence/SantosPais.pdf>, accessed on 10 August 2020.

⁸ Decision No. 685 Addendum to The Osce Action Plan to Combat Trafficking in Human Beings: Addressing the Special Needs of Child Victims of Trafficking for Protection and Assistance, 7 July 2005; Decision No.15/06 On The Combatting Of Sexual Exploitation Of Children, 5 December 2006; Supplementary Human Dimension Meeting On Combatting Sexual Exploitation Of Children, 18-19 October 2007, Final Report; -Child Trafficking: From Protection To Prevention, 28-29 May 2018, Final Report; -Decision No.9/07 On Combatting Sexual Exploitation Of Children On The Internet; Decision No. 13/04 The Special Needs for Child Victims Of Trafficking For Protection And Assistance, 7 December 2004; Decision No. 13/05 Combating Trafficking In Human Beings, 6 December 2005; Decision No. 5/08: Enhancing Criminal Justice Responses to Trafficking In Human Beings Through A Comprehensive Approach, 5 December 2008;

1.1.2 Relevant regional sources

11. At the regional level, the CoE Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as “the Lanzarote Convention”,⁹ requires criminalisation of all kinds of sexual offences against children and is the most relevant legal instrument for this Opinion as the Draft Amendments aims to implement the Lanzarote Convention into Ukrainian Law. The Lanzarote Convention stipulates that states in Europe and beyond shall adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators. The Lanzarote Convention constitutes a comprehensive international instrument focusing on the preventative, protection and criminal law aspects of the fight against all forms of sexual exploitation and sexual abuse of children and setting up a specific monitoring mechanism.¹⁰ The “Lanzarote Committee” (i.e. the Committee of the Parties to the Lanzarote Convention) is the body established to monitor whether Parties effectively implement the Lanzarote Convention. The Committee is also charged with identifying good practices, in particular during capacity-building activities (study visits, conferences, etc.). To assist its work, the Committee calls upon national human rights institutions, as well as civil society and seeks child participation.¹¹
12. The four main purposes of the Lanzarote Convention are the so called “4Ps”, namely : (1) to **prevent** and combat sexual exploitation and sexual abuse of children,(2) to **protect** the rights of child victims of sexual exploitation and sexual abuse, (3) to **prosecute** the perpetrators and (4) to **promote** appropriate policies and national and international co-operation against this phenomenon. These purposes are reflected also in other legal instruments listed below. In terms of addressing demand, the Lanzarote Convention is a definite enhancement to existing regional legislation.
13. Other relevant legal instruments which will be referenced in this review include the CoE Convention on Action against Trafficking in Human Beings of 2005 (hereinafter the “COE Convention against Trafficking”), one of the primary legal instruments. Article 1, para 2 of the COE Convention against Trafficking establishes a convention monitoring mechanism to ensure the effective implementation of the Convention by all States party to the Convention. This comprehensive treaty focuses on the protection of victims of trafficking and the safeguard of their rights. It also aims to prevent trafficking and prosecute traffickers. It applies to all forms of trafficking; whether national or transnational, whether or not it is related to organised crime, whether the victim is a

Decision No. 1107 Addendum to The Osce Action Plan To Combat Trafficking In Human Beings: One Decade Later, 6 December 2013;

Decision No. 7/17 Strengthening Efforts To Combat All Forms Of Child Trafficking, Including For Sexual Exploitation, As Well As Other Forms Of Sexual Exploitation Of Children, 8 December 2017;

Decision No. 6/17 Strengthening Efforts To Prevent Trafficking In Human Beings, 8 December 2017;

Decision No. 6/18 Strengthening Efforts To Prevent And Combat Child Trafficking, Including Of Unaccompanied Minors, 7 December 2018.

⁹ Ukraine ratified the Lanzarote Convention on 27 August 2012: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>

¹⁰ Further information can be found at ECPAT, Strengthening Laws Addressing Child Sexual Exploitation, A Practical Guide, available at: https://www.ecpat.org/wp-content/uploads/2016/10/Demand-Summary-Paper_5.pdf/

¹¹ Reference should also be made to the CoE Treaty 106, of 1996, European Convention on the Exercise of Children’s Rights, which is a legal instrument meant to supplement the UNCRC. Ukraine signed this Convention in 1999 and ratified it in 2006. The Convention can be found at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdaf>.

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woman, man or child and whether the exploitation takes the form of sexual exploitation, forced labour or services or other practices.

14. Reference will also be made, importantly, to the European Court of Human Rights which has repeatedly ruled on cases of child exploitation and abuse and has settled jurisprudence on these issues, under Articles 3, 8 and 13 of the European Convention of Human Rights (ECHR). The European Court of Human Rights has also ruled that human trafficking as a crime falls under the umbrella of violations prohibited in Article 4 of the European Convention of Human Rights (ECHR) and thus cases of child trafficking with sexual exploitation as the crime's purpose could also trigger a violation of Article 4.¹² The European Court of Human Rights has frequently recognised that the object and purpose of the ECHR requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Another relevant instrument is the CoE's Convention on Cybercrime¹³ and the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.¹⁴
15. Where relevant, for the sake of completeness, the European Union (EU) legal framework will be referenced as a comparative legal analysis tool, in particular the EU Charter of Fundamental Rights (CFR) which expressly prohibits human trafficking under Article 5(3) and makes a direct reference to the rights of the child and to protection and care necessary for their well-being in Article 24. Other relevant EU law instruments include the EU Anti Trafficking Directive 2011/36/EU (hereinafter the "Anti-Trafficking Directive" which encompasses more concrete provisions on the protection of children from exploitation (including sexual exploitation), the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter "The Victims' Directive").¹⁵ The most relevant legal instrument for the purposes of this Review is Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. The EU "Money Laundering Directive"¹⁶ is also relevant as crypto

¹² European Court of Human Rights, *Rantsev v Cyprus and Russia*, (App no 25965/04), para 282.

¹³ Council of Europe, Treaty Series 185, Convention on Cybercrime (2001) available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561>, see for instance Article 9 (offences related to child pornography). Ukraine ratified this Convention on 10/03/2006 (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/U?p_auth=pj6hGsDh)

¹⁴ Council of Europe Treaty Series 198, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371f>, see for instance Article 3 (confiscation measures).

¹⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>.

¹⁶ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amended Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L0849&from=EN>.

currency can be used specifically with regard to children, as well as other relevant e-evidence/cross border access to electronic evidence EU instruments.¹⁷

2. DEFINITIONAL ISSUES

16. Definitions for crimes included under the umbrella of child sexual abuse and exploitation are contained in the Optional Protocol, the Lanzarote Convention, and the EU Directive 2011/93/EU. Helpful provisions can also be found in para 1 of Ministerial Council Decision MC.DEC 15.06 which contains a list of criminal acts which should be criminalized under the umbrella of crimes of child sexual exploitation or abuse. Ministerial Council Decisions will hereinafter be referred to with as MC.DEC or OSCE Decisions).

2.1. Definition of Crimes

2.1.1 *Sexual abuse and sexual exploitation of children*

17. The Draft Amendments (to the Criminal Code) include a number of provisions establishing and defining the crimes related to sexual abuse and sexual exploitation (although using different terminology). For example, proposed amendments to Article 96³ para (5) introduce criminal liability for crimes of a sexual nature committed by agents of legal entities, acting for and on behalf of the legal entity. Proposed revision of Article 155 establishes criminal liability for natural persons who engage in sexual activities with a person who has not attained the age of sixteen (para 1) and for those who engage in the same acts in exchange for a monetary or other reward to a victim or a third party (para two). Para 2 of Article 155 also discusses the scenario of the crime being committed by someone tasked with upbringing or caring for the victim in cases where they have caused infertility or other severe consequences. Proposed draft Article 156¹ criminalises solicitation of children for sexual purposes, while proposed draft Article 301¹ criminalises child pornography – possession (para 1), importation (para 2), production, distribution or sale (para 3). Para 4 of the same provision encapsulates an aggravated form of the crime. Draft Article 301² criminalises sexual performance with the involvement of an underage person (various forms of commitment). As mentioned above, in accordance with the draft Article 155, a child is defined as a person who did not attain the age of sixteen. Thus, all the above described criminal acts are applicable if performed with respect a victim who less than sixteen years old.
18. It should also be noted that in the Optional Protocol (Article 2(b))¹⁸, the Lanzarote Convention (Article 19) and the EU Directive 2011/93/EC (Article 2(d)), “child prostitution” is used to describe a crime which has to be given separate provisions. The Lanzarote definition of child prostitution as well as the definitions found in the other two instruments address the crime in an organised manner, paying attention to

¹⁷Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the EU and the USA on cross border access to electronic evidence for judicial cooperation in criminal matters: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en

¹⁸ *Op. cit.* footnote 5, referring to Article 2 (a)

recruitment, coercion and having recourse to child prostitution, thus emphasizing the gravitas of this heinous act. The European Court of Human Rights has also found on numerous occasions that States have a positive obligation to protect children against abuse under ECHR Article 3.¹⁹

19. The Lanzarote Convention Article 3 (a) also refers to children as persons under 18 years of age. This is also the case for other relevant sources, including the EU Directive 2011/93/EU, (Article 2 (a)), the COE Convention against Trafficking, (Article 4 d) and the Palermo Protocol (Article 3 (d)) and the Optional Protocol as it follows the definition of a child in the CRC (Article 1). It is also noted that according to the Article 1 of the CRC, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Council of Europe’s Convention on Cybercrime (para 9) defines the term “minor” as a person under 18 years, although requiring a lower age limit to be not less than 16 years. According to the Lanzarote Convention Article 18.1 (a), engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities shall be criminalised.
20. The Court clarified in *M.C. v Bulgaria* that any allegation of child sexual exploitation or abuse should be looked at without prejudice by the law enforcement and the judiciary and should be viewed in the light of the relevant modern standards in comparative and international law-to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.²⁰ MC.DEC 7/17, para 6 encourages States to effectively prosecute those who sexually exploit children while para 5(b) urges States to incorporate additional administrative measures in relation to perpetrators such as registration in sex offenders registers of persons convicted of child sexual exploitation or abuse, as appropriate.²¹
21. Furthermore, Article 18.1 (b) of the Lanzarote Convention requires from the States to take the necessary legislative or other measures to criminalize sexual abuse, engaging in sexual activities with a child using force, threats or coercion, abuse of position of vulnerability of the child and particularly vulnerable circumstances for some children such as disability or situation of dependence. EU Directive 2011/93/EC Article 3 mirrors the Article 18 of the Lanzarote Convention adding in criminalisation of forcing a child to witness sexual activities without having to participate (paras 2 and 3).²²
22. In the light of the above, while noting that **“age of consent” for voluntary sexual acts, in many countries may be lower than 18, including in Ukraine where it is 16,²³ it is**

¹⁹ See for instance European Court of Human Rights *D.P. and J.C. v the United Kingdom*, paras 136 - 138 where the Court found that the State had the responsibility to protect the children from abuse by their stepfather.

²⁰ European Court of Human Rights, *M.C. v Bulgaria*, (App. No. 39272/98), para 185.

²¹ *Op. cit.* footnote 8 (OSCE DECISION No. 7/17), Parallels can be drawn on an international comparative law with US Megan’s Law, see for instance: <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Report%20-%20Ministerial%20Decision%20-%20Design%20Final.pdf>, <https://112.international/society/police-to-ask-ukrainian-parliament-to-pass-megans-law-17388.html> and Operation Angel Watch: <https://www.ecpat.org/wp-content/uploads/2016/10/4.37-Expert-Paper-ICE-HSI.pdf>, both of whom promote international co-operation and call for increased criminal responsibility for sexual abusers of minors. The relevant provision on Angel Watch can be found in Section 4 of U.S. Megan’s Law.

²² The same provision is included in, *op. cit.* footnote 9, Article 22 “corruption of children”.

²³ <https://worldpopulationreview.com/country-rankings/age-of-consent-by-country>; According *op. cit.* footnote 9, Article 18.1 (a) requires criminalization of the sexual engagement “with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities”.

recommended to revisit the Draft Amendments by expending protection to all child victims of sexual abuse who have not attained age of 18 years, in particular introducing a higher age limit in Articles 155, para 2, 156¹, 301¹ and 301².

23. **The Draft Amendments should also address the use of force, coercion, and threats, abuse of position of vulnerability and particularly vulnerable circumstances such as disability and situation of dependence as per the Lanzarote Convention (Article 18).** To ensure future harmonisation with regional legal standards, the criminalisation of intentional causing, for sexual purposes, of a child to witness sexual activities or sexual abuse without having to participate is required.

RECOMMENDATION A.

In the Draft Amendments: Extend protection against sexual exploitation and sexual abuse to all persons below 18 years of age by defining children as persons under this age, in particular introducing a higher age limit in Articles 155, para 2, 156¹, 301¹ and 301²; Ensure that sexual abuse or sexual exploitation of a child using of force, coercion, and threats, abuse of position of vulnerability and particularly vulnerable circumstances such as disability and situation of dependence, is introduced in the Criminal Code and/or defined as an aggravated crime.

24. As mentioned above, Draft Amendments revising Article 156¹ of the Criminal Code criminalises a proposal, including through information and communication systems and technologies, of an adult to meet an underage person who is below 16 for the purpose of committing a sexual offence, where this proposal has been followed by material acts leading to such a meeting. Para 2 of the same provision criminalises a proposal through the systems referred to above for the purposes of getting the underage person involved in CSAM child pornography, where the proposal has been followed by material acts leading to such a meeting. Para 3 establishes an aggravated version of the crime against a child if the above acts are committed repeatedly or committed by a group of persons as premeditated act. This provision appears to be largely in line with the requirements of these two regional legal standards (Art. 23 of the Lanzarote Convention and Art. 6 of Directive 2011/93/EC cover solicitation of children). The Draft amendments to Article 156¹ also employ the term “child pornography”. It is important to note that while the term “child pornography”, is widely used it may not always encompass all forms of child exploitation. It is therefore suggested, where appropriate to employ the terms “child sexual abuse materials”, “sexual exploitation of children” and/or trafficking of children for the purpose of sexual exploitation, the reason being that in any regard a child cannot be considered as a participant in pornography.
25. In line with international and regional standards, it is also recommended that a separate provision is established in the Draft Amendments, criminalizing the perpetrators of CSAM, addressing recruitment, coercion and having recourse to CSAM.²⁴ **It could be considered to include in the Draft Amendments that the CSAM language replaces references to “child pornography” with “child sexual abuse**

²⁴ The European Court of Human Rights pointed out the failure of the State to implement a national definition for the particular crime in question in the case of *Soderman v Sweden*, (App. No. 8227/04), para 76.

materials”, or “sexual exploitation of children” to ensure compliance with the current policy trends on this issue.²⁵

RECOMMENDATION B.

Where appropriate, consider replacing the term “child pornography” with “child sexual abuse materials”, or “sexual exploitation of children”. All forms of commercial child exploitation should be criminalised. Include provisions to address sexual exploitation and sexual abuse of children online, including CSAM (including virtual CSAM).

26. With a view to strengthen co-operation and co-ordination among relevant authorities, such as law enforcement and immigration and border services, OSCE Ministerial Council Decision 7/17, called on participating States “to adopt additional administrative measures in relation to perpetrators, such as the registration in sex offender registers of persons convicted of child sexual exploitation or abuse, as appropriate”. It appears that the Uniform Register of Persons convicted of Crimes Against Sexual Freedom and Sexual Inviolability of a Child in Ukraine mentioned in the Draft Amendments and supplementing Article 10 of the Law On the Protection of Children, is established to meet the above MC Decision, and thus allows for registration of persons convicted of child sexual exploitation or abuse. Such measures are not deemed incompatible as such with the ECHR.²⁶ However, it is also important to ensure that the legislation must respect data protection standards to avoid misuse of such sensitive information.²⁷ Further relevant international comparative law regarding inter-country sharing of information of passport details of travelling sex offenders and specific sex offender passport identifiers can be found in United States legislation (Megan’s Law).²⁸

RECOMMENDATION C.

Ensure compliance with national and international data protection and privacy frameworks when establishing and operating a Child Sex Offenders’ Register.

²⁵ Information on regarding CSAM and language- terminology can be found here: <https://childrescuecoalition.org/educations/its-not-child-pornography-its-child-sexual-abuse-material/>.

²⁶ European Court of Human Rights, *Gardel v France*, (App. No 16428/05), para 71, *B.B. v France* (App. No 5335/06), para 70(in French) and *M.B. v France* (App. No.22115/06), para 62

²⁷ *Ibid.* (*Gardel v France*), para 62 “The protection of personal data is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention.”

²⁸ See for instance Section 6 of Megan’s Law, requiring that sex offenders provide international travel related information to sex offender registries: <https://www.congress.gov/114/bills/hr515/BILLS-114hr515enr.pdf>. See also Section 8’s very interesting provision regarding unique passport identifiers for covered sex offenders.

2.1.2 Child Sex Abuse Materials (CSAM)

27. CSAM is regulated in Article 301¹ of the Draft Amendments, which criminalises knowingly obtaining access to child pornography, possessing, procuring (para 1), importing for the purposes of selling or distributing (para 2), producing, selling or distributing (3) CSAM. The provision notably mentions coercion in para 3 as a means of achievement of the child's participation and further includes an aggravated version (if committed repeatedly or results in income of a grand scale) (para 4). The definition of ways that the crime of child pornography can be committed appears to be thorough and covering the scenarios provided by international and regional legal standards.
28. The Optional Protocol includes a short definition of child pornography as a crime in Article 2(c) and its criminalisation in Article 3(c). The Lanzarote Convention covers child pornography in Article 20, while EU Directive 2011/93/EC does in Article 2(e) and Article 5. All instruments include definitions of what child pornography is within their respective provisions.²⁹ Draft amendments to Article 301¹ appear to be fully compatible with the requirements of these two regional legal standards. The COE Convention on Cybercrime in Article 9(1) refers to child pornography produced by and/or distributed through a "computer system". While "computer system" is a dynamic term, it is nevertheless **suggested to considered mentioning in the Draft Amendments other specific forms of CSAM and CSE, including film, DVD, CD-ROM, diskette, CD-R, and other electronic media and devices including computers, tablets and mobile phones; and (ii) all the ways CSAM could be distributed including via the internet.**

RECOMMENDATION D.

Clarify in Article 301¹ of the Draft Amendments all forms CSAM and CSE could take, including film, DVD, CD-ROM, diskette, CD-R, and other electronic media and devices including computers, tablets and mobile phones.

2.1.3 Solicitation

29. Solicitation of children for purposes of sexual abuse and exploitation is covered by Article 156¹ in the Draft Amendments. The provision criminalises a proposal, including through information and communication systems and technologies of an adult to meet an underage person who is below 16 (see section 2.1.1 regarding age) for the purpose of committing a sexual offence, where this proposal has been followed by material acts leading to such a meeting. Para 2 of the same provision criminalises a proposal through the systems referred to above for the purposes of getting the underage person involved in CSAM child pornography, where the proposal has been followed by material acts leading to such a meeting. Para 4 establishes an aggravated version of the crime if the

²⁹See *Op. cit* footnote 8 (Final Report of the Supplementary Human Dimension meeting "On Combatting the Sexual Exploitation of Children", p. 6.

above acts are committed against a child repeatedly or committed by a group of persons as a premediated act.

30. Article 23 of the Lanzarote Convention and Article 6 of Directive 2011/93/EC cover solicitation of children. Article 156 of the Draft Amendments appears to be fully compatible with the requirements of these two regional legal standards, except the age limit employed to define a child. **This should be changed in line with the requirements in the international standard as outlined under section 2.1.1 *supra*.**

2.1.4 Offences concerning the participation of a child in the production of CSAM

31. Article 301¹ of the Draft Amendments covers conduct of a sexual performance with the involvement of an underage person. Paras 1 and 2 concern the organisers and participants: Para 1 ensures that this includes information and communication technologies and para 2 covers attendance of such performances with the intention of viewing it (including through information and communication technologies). Para 3 concerns participation of the child in such a performance, in particular recruitment of an underage person or coercing them with the “use of deceit, blackmail, by taking advantage of the person’s vulnerable state, or with the use of violence or threat of violence”.
32. Article 21 of the Lanzarote Convention and Article 5 of the EU Directive 2011/93/EC define, regulate and require criminalization of child’s participation in pornographic performances. Article 21 of the Lanzarote Convention in para 1(b) states that the crime also includes “profiting from or otherwise exploiting a child for such purposes”.
33. The Draft Amendments to Article 155 have incorporated and specified the regional legal standards as regards child participation in various sexual acts and in Article 156¹ on sexual solicitation. However, it contains no regulations as regards profiting from or otherwise exploiting a child. Therefore, in order to fully harmonize the draft law with Lanzarote Convention **it is recommended to amend the draft law adding reference to “profiting from or otherwise exploiting a child for such purposes including all forms of child commercial exploitations”. The Draft Amendments should also include a short provision covering the non-punishment and non-prosecution of children involved in the recruitment or solicitation of other children for CSAM or other forms of child trafficking and exploitation, in line with the section on non-punishment and non-prosecution in section 4.1 *infra*.**

RECOMMENDATION E.

Add provisions on “profiting from or otherwise exploiting a child for such purposes including all forms of child commercial exploitations” for complete fulfilment of obligations in Article 21 of the Lanzarote Convention.

2.1.5 Aiding and Abetting

34. There are no provisions in the Draft Amendments indicating criminalisation of aiding and abetting crimes of child sexual exploitation and abuse. This obligation is

established in Article 3 para 2 of the Optional Protocol, Article 24 of the Lanzarote Convention,³⁰ and Article 7 of the EU Directive 2011/93/EC. **It is recommended aiding and abetting crimes of child sexual exploitation and abuse be criminalised.**

2.1.6 Previous convictions in other State parties to the Lanzarote Convention

35. Article 29 of the Lanzarote Convention contains an important provision for State parties to provide, through legislative or other measures, for the possibility to take into account previous convictions imposed by another Party to the Lanzarote Convention in relation to offences covered by the Lanzarote Convention when determining the sanctions in light of the principle of international recidivism.³¹ This is an important provision which aims to ensure that perpetrators are punished according to the law and encourages cross border co-operation in the investigation and prosecution of child sexual exploitation and abuse crimes. **Such provision cannot be found in the Draft Amendments and it is recommended such be introduced.**³²

RECOMMENDATION F.

Include provisions on the possibility to take into account previous convictions imposed by other State Parties to the Lanzarote Convention. In line with Article 29 of the Convention.

2.1.7 Punishable entities

36. The Draft Amendments, as above, define the punishable entities as legal persons in Article 96 (para 5) and natural persons in Article 155 (para 1). These definitions address in a rather succinct way the criminalisation of sexual activity with an underage person. The definition of liability for corporate actors reads that “the commission by an agent of a legal entity, acting for and on behalf of the legal entity, of any of the crimes punishable under [this law] against a child or underage person”.
37. The legal requirements for liability of natural persons has been addressed above in connection to particular crimes.³³ As regards the corporate liability, Article 26 of the Lanzarote Convention establishes in para 1 liability for legal persons not only in the cases covered in Article 96 of the Draft Amendments, but also according to Article 1(c) for a person with an authority to exercise control within the legal person. Further, in para 2, the Lanzarote Convention requires that States take the necessary legislative or other measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person has made possible the commission of an offence covered by the Convention, for the benefit of that legal person by a natural person acting under its authority. In addition to the above, para 4 of the same Article

³⁰ Albeit according to para 3 of Article 24 the Parties may reserve the right not to apply in whole or in part para 2 to specific offences established in Article 20 (child pornography), Article 21 (participation of a child in pornographic performances), Article 22 (corruption of children) and 23 (solicitation).

³¹ See Explanatory report to the Lanzarote Convention, para 205. Available here: <https://rm.coe.int/16800d3832>

³² *Ibid.*

³³ See also the CIS Model Law on human trafficking (CIS Model Law) which provides a very extensive coverage and description for liability in natural persons for human trafficking crimes.

specifies that this is without prejudice to the criminal liability of the natural persons who have committed the offence.

38. **In line with legal standards above, it is recommended to add concrete legal provisions within the Draft Amendments ensuring that legal persons can be held liable, as per Article 26 of the Lanzarote Convention. A provision should also be added to specify that any legal person is without prejudice to the criminal liability of natural persons perpetrators of such crimes.**

RECOMMENDATION G.

Introduce concrete legal provisions within the Draft Amendments ensuring that legal persons can be held liable, as per Article 26 of the Lanzarote Convention.

3. LEGISLATION ON PREVENTION OF ABUSE AND EXPLOITATION

3.1. Awareness-raising

39. The Draft Amendments to the “law on the Protection of Children”, supplementing Article 10 of the law introduce provisions requiring employees in educational, health care, social security, physical education and sports, rehabilitation and recreational institutions, as well as institutionalized care facilities, who come in contact with children to be familiarized with information on child protection against all forms of abuse including domestic violence, all forms of exploitation, child labour or other manifestations of such cruelty. The second para of this section establishes an obligation for the administration of such institutions to “inform” “from time to time” about child protection and all forms of abuse and exploitation. The procedure and the arrangement of such activities is left to be regulated in a joint act of the central executive authority (para 3) Para 4 discusses activities on prevention nationwide. Draft Article 30² mentions identification of [possible] child victims as part of the procedure approved by the Cabinet of Ministers of Ukraine and further para 5 leaves the identification procedure to be determined by a future joint act. These provisions reflect on very general terms the main spirit of the international law standards applicable in relation to prevention.
40. The importance of prevention of crimes of child sexual exploitation or abuse is highlighted in the existing international and regional legal instruments. Article 9 of the Optional Protocol stipulates in para 1 the obligation of State Parties to adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent offences of child abuse and exploitation. It emphasises that particular attention should be paid to protect children who are especially vulnerable to these practices. Article 4 of the Lanzarote Convention establishes the same obligation in a more concise way and elaborates on this in the articles that follow Article 4. EU Directive 2011/93/EC encapsulates the prevention obligation in Article 23. The relevant

human trafficking legal standards are also helpful on this issue.³⁴ Additionally, there are a number of OSCE decisions making explicit references to the importance of prevention, indicatively MC.DEC 7/17 which in para 1 calls on participating States to prevent all forms of child trafficking and sexual abuse of children.

41. The European Court of Human Rights has stressed consistently in its settled jurisprudence the importance of prevention of sexual exploitation and abuse of children.³⁵ Furthermore, there is very strong jurisprudence on the importance of prevention of human trafficking crimes, applicable to child victims of human trafficking.³⁶
42. The wording of the provision as it stands at the moment provides for awareness raising on child abuse and exploitation crimes in the Draft Amendments Article 301² para 3 sub sections 2) regarding the Law of Ukraine on the Protection of Children (Ukrainian Parliament Bulletin 2001, No. 30, Title 142) stating that the procedure for “such awareness raising (which could also mean training amongst officials in contact with children) and their frequency shall be stipulated in a joint act of the central executive authority (...) in the matters of family and children” and that “awareness raising shall be carried out according to plans drafted annually and approved by regional state administrations with the central executive (...) family and children and with the relevant divisions of the National Police”. Subsection 4 of the same provision continues that prevention activities shall be integrated into programmes of social protection and improvement of the situation of children. The wording adopted for awareness-raising activities in the Draft Amendments is easy to confuse with the obligation to provide relevant training (see Section 3.2 below). While these provisions are important steps in the right direction, **more concrete wording may be considered, making the distinction between training provision and awareness-raising more prominent. It**

³⁴The prevention of trafficking in human beings is mentioned as a core principle in *Op. cit.* footnote 6, Article 2, para (a) and Article 1, para (a) of the CoE Convention against trafficking. *Op. cit.* footnote 6, Articles 9-13, treats specific aspects of prevention and co-operation, namely the establishment of pertinent policies, programmes and measures, information exchange, border measures, and actions to ensure the security, authenticity and verification of travel and identity documents. *Op.cit* footnote 34, (COE Convention against Trafficking) Chapter II (Articles 5-9) describes similar prevention aspects and further includes measures to discourage demand for services that are linked with trafficking in human beings in particular the adoption or strengthening of legislative, administrative, educational, social, cultural or other measures to discourage the demand that fosters all forms of exploitation of persons, especially women and children. Also present in Article 9 of the Palermo Protocol. Prevention is also a part of the EU Anti-Trafficking Directive, see Articles 1 and 18. Similarly, according to para 3 of Article 5 of the CIS Model Law on Combatting Trafficking in Human Beings, the State must ensure not only the compliance of national legislation with the norms and standards of international law, but also ensure the effectiveness of such legislations.

³⁵ European Court of Human Rights, *O’Keeffe v Ireland*, (App.No. 35810/09), para 162.

³⁶While the content of State obligations has been developed in by European Court of Human Rights jurisprudence, the fundamental obligation of States is derived from Article 1 ECHR. Read in conjunction with other ECHR Arts, Article 1 obliges Contracting States to secure the rights and freedoms under Section I of the Convention that are relevant to the situation of the individual. This can entail, for example, an obligation on the State to take all reasonable steps to prevent harm of which they knew or ought to have known, under Articles 2 and 3 ECHR, as set out in the case of *Osman v the United Kingdom* (referred to as the *Osman* test).³⁶ While the *Osman* test was initially formulated by the European Court of Human Rights to determine when States have a positive obligation to intervene to protect individuals from the acts of other private parties under Article 2 of the ECHR, it has been applied subsequently in cases claiming violations of Arts 3³⁶ and 4³⁶. While the majority of human trafficking cases before the European Court of Human Rights rely on Article 4 when claiming a State obligation, Article 3 has also been relied on before the Court.

should be made clear that awareness-raising is broader than specialised training which should be aimed and tailored at needs of specific target groups.

43. Article 9 of the Optional Protocol establishes in para 2 the obligation of the State to promote awareness in the public at large, including for children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences covered by the Optional Protocol. Article 5 of the Lanzarote Convention stipulates that awareness raising, especially among those who come in regular contact with children should be established by the necessary legislative or other measures, dedicating separate provisions for the education of children in Article 6 (information provision in collaboration with parents including with the use of technology) and general public awareness raising in Article 8 (through *inter alia* campaigns). The European Court of Human Rights in *O’Keefe v Ireland* found that the State has a positive obligation to be aware of instances where child abuse or exploitation can occur (in this case, primary educational institutions) and thus needs to take steps to prevent it and protect potential victims.³⁷ EU Directive 2011/93/EC in Article 23, para 1 concerns education and in para 2 includes the State obligation for information, awareness raising campaigns, research and education programmes. Training of relevant stakeholders is in a separate (para 3) of the same Article. MC.DEC 7/17, para 4 also encourages education and awareness-raising through the co-operation of various stakeholders. Similar commitments can be found also in MC.DEC. 15/06, para 7 (awareness of all levels of society).

RECOMMENDATION H.

Include clear and distinct wording for awareness raising activities related to sexual abuse and exploitation, in particular for those who come in regular contact with children.

44. **It is further suggested to include special provisions devoted to education for children, in line with the provisions of Article 6 of the Lanzarote Convention, ensuring that children during primary and secondary education receive age appropriate information on the risks of sexual exploitation and abuse as well as the means to protect themselves, adapted to their evolving capacity.** This information, based on Article 6, should be provided in collaboration with parents and where appropriate shall be given within a more general context of information on sexuality and shall pay special attention to situations of risk, especially those involving the use of new technologies. Preventive education of school children to increase their knowledge about child sexual exploitation and abuse and online safety should be mainstreamed through the Ministry of Education in primary, secondary and tertiary institutions. It may be further suggested that a specialized hotline for children should be established and provided as part of the awareness raising process where they can get further information and/or report cases. Furthermore, as per Article 9 of the Lanzarote Convention, the Draft Amendments should provide for promotion or conduct of targeted awareness

³⁷*Op.cit. footnote 35*, para 168.

raising campaigns, including tailored awareness raising efforts on child's sexual abuse and exploitation.

3.2. Training

45. As analysed above (in Section 3.1), the Draft Amendments make reference to “awareness raising” for a number of professionals enumerated in Article 301², para 2 sub sections 2 and 3 and establishes an obligation for the administration of authorities employing such professionals to provide this “awareness raising” “from time to time”. Although the wording of this provision could be seen as to mean “training provision”, clearer establishment of the obligation of regular training to professionals is required in line with international and European legal standards.
46. The Optional Protocol establishes a clear obligation of the States to provide appropriate training, in particular legal and psychological training, for the persons who work with the victims of offences of child abuse and exploitation in Article 8, para (4), and further in Article 9, para 2, distinguishing awareness raising and training efforts. According to the Lanzarote Convention (Article 5.1), States are required to implement necessary legislative or other measures “to encourage awareness of the protection and rights of children among persons who have regular contact with children in the education, health, social protection, judicial and law-enforcement sectors and in areas relating to sport, culture and leisure activities. The Lanzarote Convention further specifies in Article 5, para 2 that such “knowledge should be adequate to render the persons capable of victim and potential victim identification”. According to Article 36 of the same Convention, training is mandatory for all persons involved in criminal proceedings, including judges, prosecutors and lawyers. The matter is even clearer in EU Directive 2011/93/EC, which in Article 23(3) establishes an unambiguous obligation of training “for officials likely to come into contact with child victims of sexual abuse or exploitation, including front line police officers, aimed at enabling them to identify and deal with child victims and potential child victims of abuse or exploitation. MC.DEC 9/07 urges OSCE participating States to enhance specialised training for law enforcement, teachers and health professionals, as well as legal guardians and immigration officials, as appropriate, on combating CSAM and virtual CSAM including via use of existing technologies and programmes³⁸. Similar commitments can be found in MC.DEC 15/06 adding in the categories of justice, policing, tourism, transport, social work, social care, civil society, religious organisations and education.³⁹

³⁸ *Op. cit.* footnote 8 (MC.DEC 9/07), para 9

³⁹ *Op. cit.* footnote 8 (MC.DEC 15/06), para 11 see also para 15. See also the relevant standards for anti-trafficking, for instance the OSCE Action Plan calls participating States to provide or improve training for border officials, law enforcement officials, judges, prosecutors, immigration and other relevant officials in all aspects of trafficking in persons by giving, in such training programs, consideration to human rights and child and gender-sensitive issues, and encouraging co-operation with non-governmental organizations, other relevant organizations and other elements of civil society. Furthermore, MC.DEC 5/08, para 2, *inter alia*, encourages Member States to ensure that training on combating trafficking in human beings is included in the curricula for law enforcement personnel and that specialized anti-trafficking training is provided for relevant officials in national prosecution services and the judiciary. PC.DEC/1107/Corr.1 (Addendum to the OSCE Action Plan) also includes in Article 2.1 a detailed list of stakeholders to be trained in the human trafficking area. See also *Op.cit* footnote 34 (COE Convention against Trafficking), Article 10 (1) (focus on children) and *op. cit* footnote 12, para 287.

47. In order for the Draft Amendments to comply with the above mentioned legal standards the following recommendations are made:

The training needs for professionals in key positions in close contact with children victims or potential victims should be clearly addressed in the Draft Amendments to the Law on the Protection of Children. The obligation should include regular provision of high quality, tailored training capable of leading to the identification of victims or potential victims. The training should include as a minimum familiarisation with the relevant legal and psychological standards and applicable texts, be human rights based, gender sensitive and trauma informed. **In this respect, specific groups such as social workers, psychologists, professionals who work with minors, specialists of social and legal assistance, professionals in specific units for minors, law enforcement personnel** (especially those employed in units involved with child abuse, exploitation or human trafficking) **and border guards** should be especially referred to in relation to tailored training reception, as well as judges, consular workers, legal guardians, medical staff, transportation staff, labour inspectorates and trade union staff.⁴⁰

48. In line with MC.DEC 14/06, para 6 (c) which concerns trafficking victims staff working in positions, which may play in a crucial role in early identification of presumed victims of child abuse and exploitation, should be identified and be provided with regular training opportunities could include public officials, health personal, but also in the private sector, depending on the context.

RECOMMENDATION I.

Training provisions should incorporate the principle of protection of victim's rights throughout the entire identification and rehabilitation procedure. Furthermore, particular gender needs of child victims and the rights of the child should be a primary consideration in the development of suitable capacity building sessions for each interested group, with particular focus on the principle of non-discrimination and particularities in identification of girl- and boy- victims and assistance with a view of non-discrimination.⁴¹

3.3. Prohibition of material sexual abuse or exploitation of children

49. The Draft Amendments do not include specific provisions explicitly prohibiting circulation of material advertising child sexual exploitation or abuse within the document provided to OSCE/ODIHR. Although acknowledging that Criminal Code (article 301) criminalizes, among other, dissemination of “pornographic items”, further review of Ukrainian criminal law is required to evaluate if legislation fully complies with the international and regional legal standards on this issue. In any event, it should be ensured that domestic legal provisions comply with the standards below.

⁴⁰ Such measures can be part of the national action plans and strategies already developed. In line with the *Op. cit.* footnote 8 (Final Report of the Supplementary Human Dimension meeting “On Combatting the Sexual Exploitation of Children), p. 5.

⁴¹ This is in line with *Op. cit.* footnote 34 (COE Convention against Trafficking), Article 5, para 3 of the and *Op. cit.* footnote 6, Article 14, para 2.

50. The Optional Protocol urges States to prohibit by legislative or other measures in Article 9, para 5 the production and dissemination of material advertising the offences of child exploitation and abuse. Similar provisions feature in the Lanzarote Convention, Article 8, para 2 and in the EU Directive 2011/93/EC Article 21 with the added wording “advertising *the opportunity* [emphasis added] to commit any of the offences” in para 1 and prohibiting in para 2 the “organisation for others, whether or not for commercial purposes, of travel arrangements with the purpose of committing any of the offences covered by the Directive.
51. In order for the Draft Amendments to comply with the above stated legal standards, **it is necessary to add a clause criminalising the circulation of material advertising *the opportunity of sexual exploitation or abuse and further criminalising the organisation (for commercial purposes or not) arrangements for travel with the purpose of committing child sexual exploitation or abuse.***

RECOMMENDATION J.

Include a clause criminalising the circulation of material advertising *the opportunity* of sexual exploitation or abuse.

52. **In line with MC.DEC. 9/07, para 7, the Draft Amendments should include provisions encouraging work on a national basis with Internet service providers, credit card companies, banks and other relevant corporations to prevent the use of Internet for sexual exploitation of children and to impede payment methods in order to make the crime less profitable to address demand for child pornography on the Internet.** In addition, Internet service providers should offer parental control products that enable customers to limit the types of websites, social media platforms, and internet content that are accessible to children. Internet service providers should also prepare and issue transparency reports, including disclosures in terms of service, relating to identifying, categorizing, and reporting child sexual exploitation and efforts to prevent and disrupt online child sexual exploitation.
53. In line with MC,DEC 7/17, para 7, the Draft Amendments **should include provisions promoting the use of age verification technology with a view to limit the access of children to pornographic websites, including through employment of age rating and age gating systems to reduce child sexual exploitation.**

3.4. Preventive Intervention Measures

54. The Draft Amendments do not include specific provisions offering preventative intervention measures for those who contemplate committing the offences of child sexual abuse and exploitation nor is there a reference to such intervention measures existing/being on offer in the course of or after the conclusion of criminal proceedings. The closest available provision in the current Draft Amendments can be found in the *Law of Ukraine on the Protection of Children*, para 3 section 5 stating that “activities aimed at deterrence and prevention of abuse shall be integrated into targeted nationwide programs of social protection and improvement of the situation of children”. The provision goes on to exclude any person whose details appear in the Uniform Register

of Persons Convicted of Crimes against Sexual Freedom and Sexual Inviolability of a Child from employment exposing them to contact with children. No other preventative intervention measures are specified despite the existence of clear regional standards to this effect.

55. In particular, the Lanzarote Convention includes a specific provision dealing with preventative intervention measures in Article 7 asking States to ensure that persons who fear that they might commit any of the offences established therein may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed. The Convention further devotes an entire Chapter (V) to preventative intervention programmes for the purpose of preventing potential offenders and avoiding re-offending. Article 15 outlines the general principles while Article 16 specifies details regarding recipients of such programmes and their rights. Article 17 deals with consent and information. The EU Directive 2011/93/EC provides for such preventative intervention programmes in Article 22 and intervention programmes or measures on a voluntary basis in the course of or after criminal proceedings in Article 24.

RECOMMENDATION K.

Additional clauses on preventative (pre-offence) intervention and intervention programmes in the course of or after criminal proceedings should be added (including offender registers), in order for the Draft Amendments to be harmonised with the Lanzarote Convention standards.⁴²

3.5. Interagency and interstate co-operation and involvement of civil society

56. Interagency and interstate co-operation as well as involvement of civil society is mentioned in several parts of the Draft Amendments (co-operation and co-ordination is implied in the amendments to the *Law of Ukraine On the Protection of Children*). The Draft Amendments reflect, in very broad terms, the spirit of international legal requirements for interagency co-operation in the field of child sexual abuse and exploitation as explained below:
57. The Optional Protocol highlights in Article 10 the importance of international co-operation by multilateral, regional and bilateral agreements on concrete aspects of the crimes in question. It further stresses the need for inter-agency co-operation and co-ordination within State authorities, as well as with the involvement of civil society and international organisations. Direct references to root causes such as poverty and underdevelopment contributing to enhanced vulnerability of children are included. Article 10 also includes a direct reference to sex tourism. The Lanzarote Convention has a similar provision in Article 10(1) and (3) ensuring the collaboration and co-ordination of State mechanisms and agencies, while Article 38 concerns international co-operation [(emphasis on the principles of mutual legal assistance in criminal matters

⁴² From an international comparative law perspective, see also relevant US Megan's Law standards at Section 3(8) providing for the creation of a National Sex Offender Registry, available at: <https://www.congress.gov/114/bills/hr515/BILLS-114hr515enr.pdf>

or extradition (...)]. MC.DEC 7/17, para 1, encourages co-operation amongst participating States, international organisations and civil society, and further calls on OSCE Participating States (para 5) to strengthen co-operation and co-ordination among relevant authorities, such as law enforcement, immigration and border services of participating States (...).⁴³ The relevant human trafficking legal standards all include similar provisions to this effect.⁴⁴

58. **More concrete provisions should be adopted in relation to three targeted areas, which are currently underdeveloped in the Draft Amendments, namely collaboration with regard to identification of abuse and exploitation victims, training and information collection.**

3.6. Monitoring and data collection systems on the situation of sexual abuse and exploitation of children

59. Rigorous, continuous and consistent monitoring as well as data collection constitute key elements in prevention of child abuse and child exploitation crimes as well as inform protection and prosecution efforts. The Draft Amendments do not deal with the issue of monitoring and data collection within the document available to OSCE/ODIHR. No reference is made to concrete statistical information collected in respect of victims or recording of trends and/or development of specialised databases, as is provided in relevant international standards. Furthermore, the role of the media in research and reporting is not directly mentioned, although the media is referred to a number of times in the new Ukrainian law. A further review of Ukrainian criminal law is required to verify whether Ukraine has complied with the international and regional legal standards on this issue. In any event it should be ensured that domestic provisions comply with the standards below:

⁴³ See also *Op. cit.* footnote 8 (MC.DEC 15/06), para 9 supporting co-operation in collaboration with NGOs and appropriate representatives of relevant sectors of the economy such as the travel, hospitality or media industries to eliminate demand for sexual exploitation of children.

⁴⁴ At international level the OSCE Decision No. 14/06, para 2, Enhancing Efforts to Combat Trafficking in Human Beings, Including for Labour Exploitation, Through a Comprehensive and Proactive Approach, urges the participating States to promote a comprehensive approach to combating all forms of trafficking in human beings through national, regional and international arrangements, co-operation and co-ordination between law enforcement personnel, labour inspectorates, social protection units, medical institutions, immigration and border service officials, civil society organizations, victim support services, and the business community and any other relevant actors, also including a gender-sensitive approach. To this end, the participating States are recommended to establish National Referral Mechanisms (NRMs), as well as to appoint national co-ordinators. Furthermore, PC.DEC/1107/Corr.1 (Addendum to the OSCE Action Plan) under Chapter V provides with a detailed list of recommended actions at national level to enhance partnerships domestically. Similarly, in Article 5, para 1 of *op.cit.* footnote 34 (COE Convention against Trafficking), the States are required to strengthen or establish a national co-ordination mechanism, consisting of various bodies, in order to improve co-operation across different agencies in the fight against trafficking in human beings. Para 6 of the same Article stresses the importance of involving non-governmental organisations and other civil society organisations committed to anti-trafficking efforts in the development and implementation of prevention measures, where appropriate. Further, par 6 of the same Article stresses the importance of involving non-governmental organizations and other civil society organizations committed to anti-trafficking efforts in the development and implementation of prevention measures, where appropriate. This principle is also laid down in *op.cit.* footnote 6, Article 9 par 3. Reference to National Rapporteurs or equivalent mechanisms and close co-operation with civil society organisations is also made in Article 19 of the EU Anti Trafficking Directive.

60. While the Optional Protocol and EU Directive 2011/93/EC do not explicitly address monitoring and data collection, the Lanzarote Convention dedicates a full Article to recording and storing of data of convicted sexual offenders. Article 37 states that the State should enact specific legislative or other measures to collect and store data relating to the identity and the genetic profile (DNA) of persons convicted of sexual abuse and exploitation. This must be conducted in accordance with data protection principles⁴⁵. Article 37, para 2 mentions that a single national entity shall be responsible for the above mentioned task and para 3 includes transmission procedure details. MC.DEC 9/07, para 6 calls on participating States to support, as appropriate, increased data collection and research on sexual exploitation of children and child pornography on the internet in order to better understand the scope and trends of the problem and thereby increase the effectiveness of programmes to combat it.⁴⁶ Helpful indications can also be found in MC.DEC 15/06, para 8, advising States to develop compatible and exchangeable data registration systems specific to the sexual exploitation of children, with due regard for confidentiality, and to promote comprehensive data collection mechanisms and research on child sexual exploitation. The relevant international anti-trafficking legal standards include similar provisions to this effect.⁴⁷
61. In order to obtain reliable data characterizing trends, achievements and new risks in the field of combating child abuse and exploitation in Ukraine, **it is recommended to develop a data collection system at the national level, while respecting data protection principles as mentioned above.**
62. Data collection should be carried out in the following areas: the number of alleged victims, the number of children with the confirmed status of victims, the social and demographic characteristics of victims, types of exploitation or abuse, the recruitment method, countries of destination, transit and origin, the method of identifying victims, organizations providing assistance in each case, and assistance results. Further areas of focus, which should be covered in domestic provisions, include socio-cultural aspects of child abuse and exploitation.
63. In line with the standards discussed above calling for facilitating research and information collection/exchange, in order to develop and effectively implement procedures and national referral mechanisms for children who became victims of sexual exploitation, abuse and trafficking, it is recommended to establish the legal framework for the conduct of a comprehensive research on the system of child protection in Ukraine. The main objective of the research would be to identify successful practices as

⁴⁵ *Op. cit.* footnote 31, paras 243 and 246-247,

⁴⁶ See also para 2 and 8 of the MC.DEC 15/16 which encourages participating States which have not already done so to collect and store information, in accordance with national provisions on the protection of personal data, on persons convicted of sexual exploitation of children or abuse in order to facilitate the apprehension of perpetrators and monitoring of their probation (...).

⁴⁷ In line with *Op. cit.* footnote 8 (Final Report of the Supplementary Human Dimension meeting “On Combatting the Sexual Exploitation of Children), p. 6. See also the OSCE Action Plan address this aspect in Ch. IV (1) and V(1.1). *op. cit.* footnote 8 (OSCE MC.DEC 6/17), in para 1 encourages States to develop enhanced research and systematically gathered reliable information in co-operation with other relevant stakeholders and stresses, in para 8, the role of media in prevention of human trafficking. The CIS Model Law stresses in Article 4 the vital role of “independent and effective supervision and monitoring of the implementation of the state legislation and the fulfilment of the state’s international obligations in the field of combating human trafficking. The importance of collection of objective, reliable, comparable and up-to-date strategic information in the field of trafficking in human beings as well as experience and best practices in the field of preventing and combating trafficking in human beings is also mentioned in preamble 27 of the EU Anti-Trafficking Directive.

well as weaknesses in the system of child protection at the national and local levels. Information and data collection can be supported by the organisation of relevant annual monitoring visits to places of potential child exploitation (including unaccompanied children and children in institutionalized care). Data collection and reporting should be followed by scientifically based recommendations for the development and implementation of procedures for the national referral of children victims of abuse, exploitation and trafficking.

64. **In line with MC.DEC 6/17, para 8, the central role of mass media, social media and new technologies in providing platforms for information collection, statistics and monitoring should be highlighted in the text of the Draft Amendments.** Concrete wording should be adopted in relation to the State's continuous co-operation with such relevant stakeholders and ensuring smooth and effective co-operation in this respect with due respect for the need of protection of victims' personal information and sensitive data.

RECOMMENDATION L.

Develop a data collection system at the national level on the situation of sexual abuse and exploitation of children, while respecting data protection principles.

4. LEGISLATION ON PROSECUTION AND PROTECTION OF CHILD VICTIMS, EFFECTIVE PROSECUTION AND INVESTIGATION

65. Criminalisation of all acts of sexual abuse, exploitation and trafficking relating to children, importance of effective investigation and prosecution is highlighted in all relevant international and regional legal instruments.⁴⁸ The Optional Protocol includes relevant provisions on jurisdiction (Articles 4 and 25), and co-operation (Articles 6 and 10). The Lanzarote Convention emphasizes effective investigation (Articles 30, 32 and 34), co-operation (Article 38). Importantly, the Lanzarote Convention stipulates in Article 34 (statute of limitations) that States should take measures to ensure that the statute of limitations of initiating proceedings for crimes of child sexual abuse and exploitation shall continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of maturity, and which is commensurate with the gravity of the crime in question. The EU Directive 2011/93/EC also focuses on jurisdiction (Article 17), relevant definitions of offences (Articles 2, 18-23), effective investigation (Article 15) and importantly, gives the added value of the non-punishment principle and necessary assistance to victims (Article 14). The CoE Convention on Cybercrime also provides with important safeguards pertaining to investigative tools and cybercrime (see section 2.1 *supra*).

⁴⁸ *Op. cit.* footnote 3, Article 3, *Op. cit.* footnote 9, Article 3 and EU Directive 2011/93/EC Articles 1 and 3. See also MC. DEC 9/08 which calls upon States to consider criminalizing the international acquisition and possession of child pornography given the viewing and possession of it stimulates the growth of this illicit industry and *op. cit.* footnote 8 (MC.DEC 15/06), para 4.

66. The relevant anti-trafficking international instruments, also applicable in the cases of children victims of human trafficking and in particular sexual exploitation, provide necessary guidance on the subject of prosecution.⁴⁹
67. To ensure efficiency of investigation and prosecution within national legislation it is recommended that the following principles be adopted:
- **Independence of investigation:** Investigation into or prosecution of offences of child exploitation and abuse crimes should not be dependent on report or accusation by a victim. In the interest of justice, criminal proceedings may continue even if the child victim has withdrawn their statement and through the use of victimless prosecution methodology;
 - **Prosecution:** In line with Article 33 of the Lanzarote Convention all necessary measures should be taken to enable, where the nature of the act calls for it, the prosecution of a child sexual abuse or exploitation crime for a sufficient period of time after the victim has reached the age of majority;
 - **Victim and child centred training:** Appropriate, child victim-centred training based on a trauma informed approach should be available to all units responsible for investigating or prosecuting child sexual abuse or exploitation or child trafficking crimes;
 - **Witness and victim protection:** Protection of witnesses and victims in cases is important as they may both be at risk of instances of retaliation;⁵⁰
 - **Effective investigative tools:** Necessary measures should be taken to ensure that effective investigative tools, such as those used in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting child sexual abuse or exploitation crimes, including financial investigations

⁴⁹*Op. cit.* footnote 6, Article 5 obliges States to adopt legislative and other measures as may be necessary to establish as criminal offences intentional acts of trafficking as defined under Article 3 of the Protocol. According to Article 5, para 2, attempting to commit such acts shall also be a criminal offence, as shall aiding and abetting, or “organising or directing” other persons to commit such acts. Furthermore, Article 4 states clearly that the Palermo Protocol shall apply to the investigation and prosecution of trafficking offences where they are transnational in nature and involve an organized criminal group. *Op. cit.* footnote 8 (MC.DEC 5/08), para 8 urges Member States to “ensure that investigations into or prosecution of human trafficking shall not be dependent upon a report or accusation by a victim”. *Op. cit.* footnote 34 (COE Convention against Trafficking) includes effective investigation and prosecution are included in Article 1, para 1 (c) on the purposes of the Convention. Chapter IV of *op.cit.* footnote 34 (COE Convention against Trafficking) treats specifically substantive criminal law. While Article 18 reiterates the criminalisation of intentional acts of trafficking in human beings stated above in Article 5 of the Palermo Protocol, Articles 19 and 20 go even further in outlining specific cases, namely the use of services of victims and acts relating to travel and identity documents. Articles 21 and 22 cover aiding/abetting and corporate liability, while Articles 23-25 deal with sanctions, aggravation of sanctions and previous convictions. Article 26 reiterates that victims of trafficking shall not be punished for engaging in unlawful activities if they have been compelled to do so. See also in the EU Anti Trafficking Directive, effective investigation and prosecution of trafficking crimes is regulated in Article 9. The non-punishment and non-prosecution principle for victims of human trafficking is covered in Article 8. The importance of effective investigation and prosecution has also been highlighted by the European Court of Human Rights in the case of *SM v Croatia* (App. No. 60561/14)) *⌋* (*Chamber judgment paras 55-60*) as well as in the previous cases of *inter alia op. cit. footnote 12 (paras 198-202)*, *Chowdury v Greece* App. No. 21884/15), *paras 86-91*, *LE v Greece* (App. No. 71545/12) (*paras 83-85*).

⁵⁰ *Op. cit.* footnote 9, Article 31(1)(f); and *op.cit.* footnote 5, Article. 8; See also *op.cit.* footnote 34 (CoE Convention against Trafficking), Article 28.

and cybercrimes investigations. Cyber-trafficking investigations should have capacity to work within the following areas: identification of IP-addresses, filtering and blocking, encryption, TOR, PhotoDNA, cloud computing and splash pages.⁵¹ Financial investigations should have the capacity to investigate cryptocurrency transactions, including block chain.⁵²

4.1. Non-punishment and non-prosecution of child victims

68. The non-punishment and non-prosecution principle is a key legal requirement under EU law that ensures that children victims of sexual abuse or exploitation are not penalised for actions that they did not voluntarily commit. According to this principle, the voluntary nature of crimes committed in the process of human trafficking or abuse should be irrelevant. It is crucial to recognise that sexually exploited minors are victims –not perpetrators- of crimes. The importance of implementation of the non-punishment principle has recently been highlighted by the United Nations Special Rapporteur on Trafficking in Persons, especially women and children.⁵³ Guideline 8 of the OHCHR Principles recommends States to consider “ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.”⁵⁴ **Despite its growing recognised importance, direct reference to the principle is absent from the Draft Amendments. The principle should be worded in a strong and clear way to ensure maximum efficiency and protection for the child, in line with relevant international legal standards.**
69. The EU Directive 2011/93/EC Article 14 is unique amongst the legal instruments dealing exclusively with child exploitation and abuse, establishing a non-punishment principle for child victims. The provision obliges Member States to take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on child victims of sexual abuse and exploitation for the involvement in criminal activities, which they have been compelled to commit as a direct consequence of being subjected to the acts covered by this Directive. This provision mirrors the relevant provision of the EU Anti Trafficking Directive (Article 8) and constitutes an important discretion of the prosecutor, allowing for judicial authorities to treat child victims with the lenience that their vulnerable situation calls for. According to Article 26 of the COE Convention against Trafficking, State Parties shall provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.⁵⁵ This would also apply to child victims of human trafficking with the ultimate aim of sexual exploitation. It is thus argued that the non-punishment and non-prosecution principle applies to child

⁵¹ For further information on online child sexual exploitation please see: <https://childhub.org/en/child-protection-online-library/online-child-sexual-exploitation-common-understanding>

⁵² See also *op.cit.* footnote 13, especially Articles 16,17,18,19, 20.

⁵³ Giammarinaro, M. G., The importance of implementing the non-punishment provision: the obligation to protect victims, available at: <https://www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf>

⁵⁴ OHCHR Principles (Office of the High Commissioner for Human Rights, Principles and Guidelines for Human Rights and Human Trafficking (2002) (hereinafter “OHCHR Principles”), Guideline 8 para 3.

⁵⁵ It is worth noting that the principle of non-punishment and non-prosecution for children victims of human trafficking is currently under the examination of the European Court of Human Rights in the communicated cases of *A.N. v the UK* (App. No. 74603/12) and *VCL v the UK* (App. No 77587/12). Further, the EU Anti-Trafficking Directive mirrors the non-punishment and non-prosecution principle in Article 8.

victims of human trafficking and child victims of sexual exploitation in general and should apply to child victims of abuse and exploitation in general. Recent ICAT Issue brief is also relevant in this respect.⁵⁶

70. The relevant OSCE documents also point in this direction. With particular reference to children victims of human trafficking, the ‘OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision with regard to child victims of trafficking to promote better understanding by the 57 OSCE States of the non-punishment principle and to encourage a more even application of its use’, contain valuable guidance.⁵⁷
71. In line with the above, the **Draft Amendments should include in its wording the non-punishment and non-prosecution principle for child victims of sexual abuse, exploitation and trafficking.** This wider interpretation of Ukraine’s obligations under regional law should include an obligation to take necessary measures to ensure that competent national authorities have the discretion not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to under the umbrella of crimes covered under the Lanzarote Convention.
72. For the crimes in question, establishing the non-punishment principle is especially important given consent to exploitation for children is irrelevant. For child safeguarding purposes and to avoid re-traumatisation, this principle should also be reflected in clear wording in the Draft Amendments. **It is thus recommended that concrete wording be**

⁵⁶ For further information, please see https://www.unodc.org/documents/human-trafficking/ICAT/19-10800_ICAT_Issue_Brief_8_Ebook.pdf.

⁵⁷OSCE “ Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking, 25 June 2013 (available here: <https://www.osce.org/secretariat/101002>): [41]. *In the case of children, therefore, no means at all, including coercion, deception or threat, are required to establish the victim status of the child. Children cannot in law consent to being trafficked nor can trafficked persons validly consent to their exploitation. “Even if a child is not threatened, no force is used against him or her, or he or she is not coerced, abducted or deceived, the child cannot give consent to the act of trafficking for the purpose of exploitation.” The EU Directive on trafficking also reiterates the prime importance of this: “when a child is concerned, no possible consent should ever be considered valid.” Hence, when non-punishment provisions are being applied to the case of a child, States should adopt a broad, not literal, interpretation of the word “compelled” which appears in both Article 26 of the CoE Convention (against Trafficking) [completion added] and Article 8 of the EU Directive on trafficking. This would involve a consideration of whether the offence committed by the child was related to the trafficking. In cases where this link is present, the prosecution should not be brought or it should be discontinued at an early stage or an appeal against conviction should be allowed; and*

[42] The Special Representative takes the view that in cases involving children, the need for a broad application of compulsion needs to be understood in light of the child’s vulnerability on account of their age alone, and of the irrelevance of consent in the legal definition of child trafficking. More specifically, where there is evidence of abuse and/or exploitation and/or trafficking of a child, from a legal perspective it should be understood that in such circumstances a child has no autonomy, is not free to make clear or informed choices such as regarding opportunities for escape and may have access to very limited, if any, alternative options. Thus, where a child is exploited and/or trafficked, and is used by a trafficker for an illegal purpose, or the child commits a criminal act related to their trafficked status, the application of the non-punishment provision is crucial, not only from a child safeguarding perspective but also to prevent the risk of secondary traumatization to the child at the hands of the State.

adopted so that the punishment of child-victims of sexual abuse and exploitation is effectively prevented.

RECOMMENDATION M.

Ensure non-punishment and non-prosecution of child- victims in case of participation in recruitment or solicitation of other children for CSAM and other forms of child trafficking or exploitation.

4.2. Effective Investigation

73. Effective investigation is key to the effective prosecution of child sexual exploitation or abuse crimes. The importance of investigation should be concretely referred to in the domestic legislation in line with the following international standards:
74. The Lanzarote Convention devotes to this issue three Articles: 30, 32 and 34. Article 30 introduces the best interests of the child (para 1) within the investigative procedure as well as a non-retraumatisation and victim centred approach (para 2). It further urges States to ensure that proceedings take place expeditiously and as a matter of priority (para 3) without endangering the defence rights and the requirements to a fair trial. The effectiveness of investigation is highlighted (para 5) and analysis methods of evidence are indicated (para 5). Article 32 requires that investigations or prosecutions not be dependent upon report or accusation made by the victim and that proceedings be continued even if the victim has withdrawn their statements. Article 34 stipulates high expertise standards for any persons, units or services in charge of investigations, who should be specifically trained in the area of sexual abuse and exploitation. The provision also calls for “adequate financial resources”. Para 2 of the same Article guarantees that uncertainty as to the actual age of the victim shall not prevent initiation of criminal proceedings. Similarly, Article 15 of the EU Directive 2011/93/EC reiterates the standards of the Lanzarote Convention, adding that investigative tools such as those used in organised crime or other serious crimes are available to investigate crimes under this Directive (para 3).⁵⁸ Furthermore, both the Lanzarote Convention and the EU Directive stress that in order for investigations to be effective, they should be able to lead to the identification of child victims.⁵⁹ MC.DEC 15/06 calls upon States to enhance the ability of law enforcement to proactively investigate and prosecute offenders (para 5), and further increase co-operation. The European Court of Human Rights has also stressed, in the case of *K.U. v Finland*⁶⁰ that mere criminalisation of acts of child abuse and exploitation is not enough-in order for State protection to be effective there needs to be investigation and prosecution capable of identifying the actual offender and bringing them to justice. In *C.A.S. and C.S. v Romania*, the Court reiterated that investigations into allegations as severe as child sexual abuse and exploitation must be speedy and

⁵⁸ *Op. cit.* footnote 8, (MC.DEC 9/07), para 3, encourages States to establish a system that allows law enforcement to work with public broadcasting and quickly send out a public alert when a child is found missing when appropriate.

⁵⁹ *Op. cit.* footnote 9, Article 30, para 5(2) and *Op. cit.* footnote 48 (EU Directive 2011/93/EC), Article 15, para 5.

⁶⁰ European Court of Human Rights, *K.U. v Finland* (App.No. 2872/02), para 49.

should be rigorous and child sensitive. Any delay of the proceedings on account of parents' delay to report the incident does not justify delay on the State to take action when information about the alleged crime was known to authorities.⁶¹ In *R.I.P. and D.L.P v Romania*, the Court further added that the investigation should aim for the speedy collection of all available evidence,⁶² while in *M.G.C. v Romania* it stressed that an effective investigation needs to be thorough and consider all the circumstances of the case, especially in cases where the victim is particularly vulnerable.⁶³ The requirements for effective investigation under legislation and jurisprudence of the European Court of Human Rights in human trafficking, also applicable in the case of children trafficked for sexual exploitation, introduces even higher commitments on this issue.⁶⁴ MC.DEC 5/08, para 9, calls upon participating States to take measures to ensure human trafficking victims are treated in a manner that respects the full enjoyment of human rights without threat of intimidation or harassment, and to recognize victims' need to have adequate time to recover from trauma, including during criminal proceedings. The CoE Convention against Trafficking, in Article 1 and 27 (para 1) requires States to “ensure effective investigation and prosecution” into trafficking offences and to “ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim.”

75. Useful guidance as to standards which could be followed in respect of effective investigation can be found in the so-called «Barnahus Model». While not law, the Barnahus Model is a child friendly, multidisciplinary and interagency model in practice for responding to child victims and witnesses of violence.⁶⁵ The purpose of this Model is to offer each child a co-ordinated and effective response and to prevent (re-)traumatisation during investigation and court proceedings without undue delays in procedures. Investigations fulfil the following criteria: 1) the forensic interview is carried to an evidence-based protocol; 2) the evidentiary validity of the child's statement respects the due process whilst avoiding a need for the child to repeat their statement during Court proceedings if an indictment is made; 3) a medical evaluation is carried out for forensic investigative purposes and to ensure the child's physical well-being and recovery; 4) psychological support is available, including shorter and longer

⁶¹European Court of Human Rights, *C.A.S. and C.S. v Romania*, (App. No. 26692/05), para 83.

⁶²European Court of Human Rights, *R.I.P and D.L.P v Romania*, (App. No. 27782/10), para 56 (in French only)

⁶³. European Court of Human Rights, *M.G.C. v Romania*, (App. No. 61495/11), para 56, in this case, the victim had an intellectual disability.

⁶⁴ *Op. cit.* footnote 12, *paras 284 and 286* held that Article 4 of the ECHR requires States to investigate potential situations of trafficking and to have in place an adequate administrative and legal framework to prohibit and punish trafficking.

⁶⁴ *Op. cit.* footnote 52 (*Chowdury and Others v Greece*), para 89 : which considered the forced labour of irregular migrants on a strawberry farm, added to the understanding of States' positive obligation to investigate situations of trafficking under Article 4 when it declared: “Article 4 imposes a procedural obligation to investigate potential trafficking situations. The authorities must act of their own motion once the matter has come to their attention; the obligation to investigate will not depend on a formal complaint by the victim or close relative...To be effective, the investigation must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The requirement of promptness and reasonable expedition is implicit in all cases, but where it is possible to remove the individual concerned from a harmful situation, the investigation must be carried out as a matter of urgency”. See also CIS Model Law Article 14, para 2 and the EU Anti Trafficking Directive 2011/36/EU, Article 9 (1).

⁶⁵ For Information on the “Barnahus model”, see “Improving the response to child sexual abuse in England”, Children's Commissioner of the United Kingdom: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>

term therapeutic services addressing child trauma and non-offending family members and caretakers; 5) an assessment of protection needs is carried out and followed up concerning the child victim as well as siblings in the family. The Barnahus Model also serves as a hub for co-operation between agencies and as knowledge hubs for information about violence against children or criminal activities targeting them.

RECOMMENDATION N.

In line with the extensive legal requirements set by the CoE Conventions and the European Court of Human Rights as well as other relevant legal instruments, the national investigation provisions should be amended to include legal provisions to ensure amongst other effective and child sensitive investigations.

4.3. Co-operation with countries of origin and transit in investigation proceedings

76. The Draft Amendments include references to co-operation predominantly amongst domestic stakeholders but not in relation to other countries or organisations. Increased and consistent co-operation with countries of origin and transit is particularly important especially with regard to investigation and prosecution of cross border child exploitation or abuse crimes.
77. The Optional Protocol encourages State Parties to “afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought” (Article 6) and to “take all necessary steps to strengthen international co-operation (...) for the prevention, detection, investigation, prosecution and punishment” of perpetrators (Article 10). Intensive co-operation between States is provided in paras 2-4 of the same Article for all aspects of victim recovery, addressing root causes and provision of funding by States which can afford to do so. The Lanzarote Convention dedicates Article 38 to international co-operation for the achievement of the goals of the Convention, especially prevention, victim recovery and mutual legal assistance. Co-operation between inter-State legal, investigative and judicial authorities is also a commitment in MC.15/06 (para 10) and MC.DEC 7/17 (para 5).
78. The Lanzarote Convention also has provisions (Article 25) establishing jurisdiction over the offences committed abroad by nationals of a State Party, on a board of ships and aircrafts registered in the State Party. The relevant standards on human trafficking (also applicable to child victims of human trafficking, especially for the purpose of sexual abuse and exploitation) could be helpful on this point, taking into account the cross-border element sometimes encountered in child sexual abuse and exploitation crimes and the direct link between the crimes of child abuse and sexual exploitation and human trafficking.⁶⁶

⁶⁶ The importance of co-operation, especially regarding investigation of child sexual abuse and exploitation crimes is highlighted in MC.DEC 5/08, para 11 which calls for increased co-operation by national law enforcement and prosecution agencies with relevant international bodies, including Interpol and Europol, and with the law enforcement agencies of other participating States, for example, through the use of liaison officers

79. **It is therefore important to ensure that relevant provisions which specifically provides for co-operation between countries of origin of victims and countries of transit and destination, including the ability to form joint investigation teams and share/exchange legal assistance are available in =the criminal legislation of Ukraine and are effectively applied.**

4.4. Presumption of minority

80. Article 303(3)(1) of the Draft Amendments introduces within the legislation the principle of presumption of minority by stating that “if the person’s age has not been established but there are reasons to believe that the person is a child, until the age of this person has been established he or she shall be afforded protection to which a child is entitled under this Law and other legislative Acts”. Age assessment procedures in Ukraine have not been reviewed as it falls outside the scope of this Opinion.
81. Presumably the provision above is a welcome effort to incorporate Article 11, para 2 of the Lanzarote Convention into domestic legislation,⁶⁷ which extends protection as if they were children to persons whose age is not yet established and whom there is reason to believe could be children. **However, it is recommended to supplement the above mentioned safeguard with the legal wording of the Optional Protocol in Article 8, para 2 which states that “States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim” to address in a more comprehensive manner the implications that age assessment may have on the investigation and protection procedures. It should also be noted that any relevant domestic age assessment procedures should be compliant with Article 10 of COE Convention against Trafficking and relevant European Court of Human Rights case law.**⁶⁸

or joint investigative teams, where doing so would enhance the efficiency and effectiveness of criminal justice responses. Another encouraging reference to information exchange is made in MC.DEC/ 6 (4 December 2001) where information exchange is encouraged with a view to strengthening investigation, law enforcement and crime prevention. International co-operation in relation to countering trafficking in human beings is regulated in detail in Chapter 5 of the CIS Model Law. The importance of co-operation of origin and transit with the country of exploitation in investigation and prosecution proceedings is highlighted both in *op.cit* footnote 34 (CoE Convention against trafficking) and *op.cit.* footnote 48 (EU Directive 2011/36/EU (preamble 5)). The promotion of international co-operation on action against trafficking in human beings is stated in the CoE Convention against trafficking as one of its three main purposes.⁶⁶The European Court of Human Rights has highlighted the importance of cross-country co-operation in the landmark case of *Op cit.* footnote 12, paras 341-343, in which it found that both Russia and Cyprus were liable to pay compensation for failure to cooperate effectively in the prevention and investigation procedure.

⁶⁷ The presumption of minority is also included in *Op. cit.* footnote 48 (EU Directive 2011/93/EC), Article 18, para 3.

⁶⁸ For a summary on relevant age assessment standards under the European Court of Human Right’s jurisprudence on Articles 3 and 8 of the ECHR please refer to the Written Submissions on Behalf of the AIRE Centre, the Dutch Council for Refugees and the European Council for Refugees and Exiles in the case of Darboe and Camara v Italy App. No. 5797/17, available at <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Darboe%20Camara%205072017%20final%20INTERVENTION%20ONLY%20as%20sent.pdf>.

RECOMMENDATION O.

Include firm legal provisions establishing a presumption of minority in case the age of the child has not been established, and ensuring that criminal investigation can commence without having confirmed the age of the person when there is reason to believe the person could be a child.

4.5. Protection of private life and data

82. Article 31, para 1 of the Draft Amendments law begins with a general reference that the “state shall protect children who are victims or witnesses of sexual abuse against sexual abuse”. No express reference to the protection of private life and personal data is made therein. It is noted that protection of private life, confidentiality and personal data is crucial and often the vulnerability of child victims is enhanced by publication or dissemination of their private life information and personal data. Such dissemination may put the victim in further danger of re-exploitation, re-trafficking or retaliation actions by the perpetrators.
83. Both the Optional Protocol and the Lanzarote Convention stress the need to protect the privacy, identity and image of victims (Articles 8 and 31 respectively). The Lanzarote Convention urges State Parties, in accordance with their domestic legislation, to implement measures to prevent the public dissemination of any information that could lead to identification of the child victims (e), and connected with this, ensure any contact with the perpetrator is avoided (g) and their physical safety is guaranteed (f).⁶⁹ In the EU legal realm, the EU-Victims Directive (2012/29/EU) dedicates Article 21 to the protection of personal data making it mandatory for the State to take measures to protect a victim (especially a child victim) from the inappropriate dissemination of their personal characteristics, personal integrity, information and Directive 2011/93 makes a reference to the importance of data protection in preamble (50).
84. **It is therefore recommended that a heightened level of protection of children-victims’ private life, personal information, personal data and identifiable characteristics should be offered, both during judicial or quasi-judicial proceedings and *en route* to recovery, regardless of the level of their involvement in the domestic criminal investigation proceedings.** For these purposes, it is necessary to include concrete provisions within the Draft Amendments to this effect, as well as develop a heightened security for the system where such data is stored. Questions about the confidentiality of personal data should be included in training programs for specialists.

4.6. Identification of Victims

85. The identification of child victims of sexual abuse and exploitation is dealt with in Draft Article 30² of the Law on the Protection of Children, of the Draft Amendments. There is

⁶⁹ See also within the anti-trafficking legal framework, similar obligations in *Op.cit.* footnote 6, *op.cit* footnote 34 (CoE Convention against Trafficking), especially Article 11 which stipulates that personal data should be stored and used in conformity with the conditions provided by the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Relevant provisions are also included in preamble 33 of the EU Anti-Trafficking Directive and Article 4, para 2 of the CIS Model Law.

no specific reference to the methodology of identification but rather a cross-reference to a procedure approved by the Cabinet of Ministers of Ukraine. Furthermore, there is a vague reference to a number of authorities which shall enact a “joint act approving the procedure for identifying signs of sexual abuse of children, questioning a child who is a victim or witness of sexual abuse, with the use of child friendly methods”. OSCE/ODIHR does not have access to the cross referenced procedure and thus cannot comment on it, **however it can be recommended that the forthcoming procedure for identification of children victims of sexual abuse or exploitation covers the points below, in line with international and European law standards.** Furthermore, the Barnahus standards referred to above under “Effective Investigation” in section 4.2 could provide useful guidance in relation to protection provided to victims and identification.

86. Article 12 of the Lanzarote Convention urges State Parties to take the necessary legislative or other measures to ensure that the confidentiality rules imposed by domestic law do not constitute an obstacle to the possibility of identification and reporting of a potential child victim of sexual exploitation or abuse. In para 2, the obligation to take necessary measures to encourage any person who knows about or suspects, in good faith, sexual exploitation or abuse of children to report these facts to the competent authorities.⁷⁰ EU Directive 2011/93/EC mirrors the above mentioned provision in Article 16. MC.DEC/9/07, para 5, advocates that participating States set up specific hotlines for the reporting of sexual abuse, including sexual exploitation of children on the internet.⁷¹
87. In line with the above, the following recommendations are made with a view to improving identification procedures for children victims of sexual exploitation or abuse (see also sections 3.1 and 3.2 on Awareness raising and training):
88. **Consideration, in line with OSCE recommendations, should be given to the establishment of a national contact point for missing and exploited children, which should be able to provide a first response to physical and psychological needs of children victims in a gender sensitive, age appropriate and trauma informed way. There should also be contact points within police stations.⁷² In line with the Lanzarote Convention Article 12, it is recommended that authorities ensure their domestic legislation and in particular confidentiality requirements for certain professions in close contact with children do not impose an obstacle to the possibility to report a potential incidents of sexual abuse or exploitation of a child where there are reasonable grounds for believing that such a case is at play.**
89. **It is recommended that Ukraine adopts strong, concrete wording within the Draft Amendments to encourage any person who knows about or suspects, in good faith, sexual exploitation or abuse of a child to report these facts to the competent services. Consideration should be given to the creation of an effective national referral system for children, clearly defining responsibilities and procedures for**

⁷⁰ See also the relevant human trafficking standards imposing stricter and more extensive obligations, for instance MC.DEC 14/06 stresses in para 6(f) the importance of using suitable technology in effective criminal investigations, The *Op. cit* footnote 34, Article 10 (CoE Convention against Trafficking) devotes a separate provision to the identification of victims, including properly trained public authorities in collaboration with other states and relevant support organisations.

⁷¹ Similar provisions on reporting can be found in MC.DEC/15/06, para 13.

⁷² *Op. cit.* footnote 8 In line with (Final Report of the Supplementary Human Dimension meeting “On Combatting the Sexual Exploitation of Children”), p. 5.

early identification, referral, assessment and registration of cases and what the different assistance options are for abused and exploited children. At all stages the need to find a durable solution in the best interests of the child is paramount.⁷³

90. Other recommendations include public-private partnerships, community led policing, social work at the community level, collaboration with other states and civil society and the creation of multi-disciplinary working groups for the proactive identification and investigation of child exploitation or abuse crimes.

4.7. Provision of medical, social and psychological assistance

91. The Draft Amendments provide for in Article 30, para 2 the “provision of medical, social and psychological assistance to such children”. It further specifies that such assistance shall be carried out “in accordance with the procedure approved by the Cabinet of Ministers of Ukraine”. It is beyond the scope of this Opinion to comment on these procedures. However, this legal provision is an important starting point, but it does not include a specific reference to assistance being free of charge, the list of available services or mention of the child’s best interest or taking into account the views, needs and concerns of the child victim, in line with international and European legal standards.
92. Provision of psycho-medical assistance to child victims of sexual abuse or exploitation is regulated in Article 9 of the Optional Protocol stating that State Parties should ensure “*all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery*”. Article 14 para 1⁷⁴ of the Lanzarote Convention mirrors this provision and further adds that “measures taken pursuant to this paragraph shall take due account of the child’s views, needs and concerns” (a provision which in turn mirrors the UNCRC Article 12 and the EU Charter on Fundamental Rights Article 24). Importantly, Article 14 para 4 extends the provision of assistance as appropriate to persons who are close to the victim (esp. Emergency psychological care). **In addition to the above, Article 13 of the Lanzarote Convention urges Member States to establish helplines in aid of victim protection and support. Lastly Article 3 of the UNCRC introducing the best interests of the child principle should also be taken into consideration.**⁷⁵ EU Directive 2011/93/EC Article 18 also introduces the best interest of the child within the concept of protection of child victims. MC.DEC 9/07 para 8 urges States to facilitate legal protection, assistance, appropriate medical care, rehabilitation and integration programmes for child victims and, where appropriate, to ensure safe return of children trafficked internationally. MC.DEC 7/17, para 2, calls on States to adopt a victim centred and trauma informed approach that takes into account the respective gender specific concerns of boys and girls, works in the best interests of the child and fully respects the human rights and fundamental rights and freedoms of children-victims.⁷⁶

⁷³ *Ibid*

⁷⁴ See also *Op. cit.* footnote 9, Article 11.

⁷⁵ See also the relevant human trafficking legal standards encompassing more detailed provisions on socio/psychological and medical assistance: *Op. cit.* footnote 6, Article 6, Article 12 *op cit.* footnote 34 (CoE Convention against Trafficking), *Op.cit.* footnote 8 (MC 5/08), para 6 and Article 11, para 5 of the EU Anti Trafficking Directive.

⁷⁶ Important guidance as to the correct application of relevant legal standards can be found in the Trauma Informed Code of Conduct, compiled by the Helen Bamber Foundation available at <http://www.helenbamber.org/wp-content/uploads/2019/01/Trauma-Informed-Code-of-Conduct.pdf>.

93. Further, it is recommended that the child is placed at the centre of this legislative provision, and that direct references be introduced to the best interests of the child as well as the child's views, needs and concerns, as per international and European standards. The right of the child to be heard should be emphasised. Furthermore, an extension of relevant services for assistance should be offered to persons close to the victim who may benefit from it, especially emergency psychological care.
94. In line with Article 13 of the Lanzarote Convention, State authorities should ensure other measures necessary to encourage and support the setting up of information and support services such as helplines for children (telephone or internet) which can provide advice to callers confidentially or with due regard for their anonymity. These help lines, as outlined in previous sections should also include a possibility for reporting incidents of abuse or exploitation.
95. **For the improvement of Article 30, para 2 of the Draft Amendments it is recommended that a gender sensitive and disability sensitive approach be introduced and streamlined throughout the provision of all services mentioned as well as awareness for age appropriateness.** Particular attention should also be made to those victims whose health is particularly precarious or children who are particularly vulnerable, such as migrant children.⁷⁷ (See also section 3.2 *supra*).

4.8. Access to legal information, counselling and assistance for children

96. The proposed package of Draft Amendments does not foresee free legal assistance to child victims of sexual abuse or exploitation, nor other safeguards aiming to the protection of child victims of sexual abuse or exploitation in relation to legal assistance.
97. Article 8 of the Optional Protocol includes a number of safeguards with respect to access to legal information, counselling and assistance, notably the need for adaptation of proceedings to the vulnerabilities of the child (1a), provision of detailed information to children regarding the state of and their status in the legal proceedings (1b), allowing support for children during the proceedings (1d), allowing their views and opinions to be expressed (1c) and their best interests to be considered (para 3), as well as protecting their safety and security at all times. The Lanzarote Convention in Article 31 para 3 urges State Parties to ensure that victims have access, free of charge where warranted, to legal aid and when it is possible for them to have the status of parties to criminal proceedings.⁷⁸ It further lists a number of other relevant safeguards as per the Optional Protocol in Article 31.1(a)(b)(c)(d) and 2. Notably, Article 31, para 6 urges State Parties to ensure that all information given to victims is provided in a child-friendly manner, taking into account the child's age and maturity and in a language they can understand. The Lanzarote Convention further enumerates in Article 35 specific safeguards with regards to the conduct of interviews with the child and in Article 36 safeguards relating

⁷⁷In line with *Op. cit.* footnote 8 (Final Report of the Supplementary Human Dimension meeting "On Combatting the Sexual Exploitation of Children)" p. 5.

⁷⁸ See also the relevant human trafficking standards: *Op.cit.* footnote 6, Article 6.2 (information to victims on relevant proceedings as well as other assistance), Article 6, para 3 (counselling and information in a language they understand), *Op. cit.* footnote 34 (CoE Convention against Trafficking), Article 1, para 1(b), UNODC Model Law Article 21, para 2 and EU Anti Trafficking Directive Article 12 on legal counselling and representation being available free of charge when the victim does not have sufficient means. Similar provisions can be found in the CIS Model Law.

to the conduct of criminal court proceedings.⁷⁹ The importance of legal protection can be seen in MC.DEC 9/07, para 8. The relevant EU Directive 2011/93/EC provisions can be found in Articles. 18, 19 and 20. The principles of Barnahus model referred to under “Effective Investigation” in section 4.2., could also be used here in order to provide optimal standards of protection for children victims.

98. In order to ensure harmonisation of national legislation with the standards named above, the following safeguards are recommended:
99. It is recommended to ensure provision of legal assistance by lawyers who have special expertise in this area of law. **Legal assistance should be free of charge where warranted (as per the wording of the Lanzarote Convention Article 31 (3)).**⁸⁰ Such legal assistance should include information, in line with Article 6 of the Palermo Protocol, on relevant court and administrative proceedings and should ensure that their views and concerns are addressed at appropriate stages of hearings. Furthermore, in line with the European Court of Human Rights’ ruling in *A and B v Croatia*, in case of conflicting interest in parent-child legal representation in judicial proceedings, a separate, child friendly lawyer representing the child should be appointed.⁸¹
100. **In line with Article 2 of the Lanzarote Convention and also Article 6 of the Palermo Protocol and the requirement to deliver appropriate assistance and address specific concerns, respect of the principle of non-discrimination against child victims of sexual exploitation should be ensured throughout the entire identification and recovery procedure, including the legal proceedings.** Specifically, it should be guaranteed that specialists trained in children victims of sexual exploitation be involved at all stages of the identification and provision of services for victims of sexual exploitation, namely: at the stage of investigative interviews, as part of the court hearing and assistance. During the court hearing, it is recommended to ensure the presence of a specialist who protects the rights of children and ensures the non-discrimination of children victims of sexual exploitation.
101. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration, in line with Article 3 of the UNCRC.**⁸²

⁷⁹ See also the relevant human trafficking standards for children *Op. cit.* footnote 6, Article 6, para 4 which stresses that states shall take into account the special needs of children, including appropriate housing, education and care. At the OSCE level, the OSCE Action Plan contains specific safeguards in relation to children victims of human trafficking under Ch. V para 10. MC.DEC 5/08 specifically refers in para. 7 to child victims with direct reference to the principles of the best interests of the child, non-discrimination and the right of the child to be heard. *Op.cit.* footnote 8 (MC. DEC 6/18) and (7/17) as well as PC.DEC/685 (para 6-13) contain additional extensive list of safeguards, which the Member States are encouraged to adopt in respect of children. At regional level, *op.cit.* footnote 34 (CoE Convention against Trafficking) contains several specific provisions on protection and assistance to child victims of trafficking, e.g. Article 10, which *inter alia* foresees representation by a legal guardian upon identification as a victim of trafficking, and the establishment of a child’s identity/nationality, and the location of his/her family (if this is in the child’s best interests). The EU Anti Trafficking Directive provides in Article 14 concrete assistance and support to children victims of human trafficking. The specific safeguards regarding children are prominent throughout the entire CIS Model Law.

⁸⁰ *Op.cit.* footnote 31, para 226.

⁸¹ European Court of Human Rights, *A and B v Croatia*, (App. No. 7144/15), para 112 referring to para 83.

⁸² The same obligation has been established also by the European Court of Human Rights in the case of *A and B v Croatia*, para 112 referring to para 83.

102. **Individual assessment of the special circumstances of each particular child victim, taking into account the child's views, needs and concerns with the aim of finding a durable solution for the child is recommended;**⁸³
103. Appointment of a guardian or a representative for a child victim of sexual abuse or exploitation in human beings should be provided swiftly if necessary. It is further important to recognise that family members and relatives may be directly or indirectly involved in the abuse and exploitation of a child. **It is therefore necessary to establish procedures in these cases to temporarily or permanently suspend parental rights and to identify and appoint legal guardians for the child, as well as provide for placement in a safe and appropriate shelter/ accommodation.**⁸⁴
104. **In line with the Lanzarote Convention (Articles 35 and 36) and the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography, the offered safeguards should include:**⁸⁵
- (a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
 - (b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
 - (c) Interviews with the child victim are carried out by or through professionals trained for this purpose;
 - (d) The same persons, if possible and where appropriate, conduct all interviews with the child victim;
 - (e) The number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings;
 - (f) The child victim may be accompanied by his or her legal representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person;
 - (g) The Court may order the hearing to take place without the presence of the public;
 - (h) The Court may order that the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies;
 - (i) The State should take the necessary measures, in the interest of child victims and taking into account other overriding interests, to protect the privacy, identity and image of child victims, and to prevent the public dissemination of any information that could lead to their identification.

4.9. Provision of Physical Protection in Criminal Proceedings

105. The Draft Amendments do not make any reference within the text provided to any practical measures which can be adopted during criminal proceedings to ensure the

⁸³ For a definition of a durable solution for a child please refer to UNCRC General Comment No. 6, available at: <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>, in combination with the «best interest of the child» principle as found in the UNCRC. In the context of this Review, a durable solution for a sexually exploited child would mean a solution which results in social inclusion.

⁸⁴ Guardianship for Children deprived of Care: A Handbook to reinforce Guardianship Systems to Cater for the specific needs of Child Victims of Trafficking, European Union Agency for Fundamental Rights, 2015, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-guardianship-children_en.pdf, p. 25-28.

⁸⁵ Op. cit. footnote 48, Article 20 (Directive 2011/93/EU).

physical, mental and psychological well-being of the child victim of sexual exploitation or abuse.

106. The Optional Protocol in Article 8(f) makes specific reference to the safety of child victims, as well as of their families and witnesses on their behalf. The Lanzarote Convention includes general provisions on practical protection in Article 31, para 1(f) and special measures in Article 14, para 3 where exploitation or abuse comes from the family environment of the child (including removal of the child from the family environment or removal of the perpetrator). EU Directive 2011/93 Article 19, para 1, highlights the importance of assistance and support during and for a period after criminal proceedings, while para 2 emphasises that this support should be unconditional and not dependent on the child's willingness to cooperate in the criminal investigation, prosecution or trial. Similarly, the EU Victims Directive stipulates in Article 18 the "Right to protection" that Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional and psychological harm, and to protect the dignity of victims during questioning and when testifying (...). Relevant international and European human legal standards against human trafficking also include provisions for such unconditional protection.⁸⁶ Interesting comparative legal system guidance can also be found in the G.R.A.C.E Court paradigm in the U.S.⁸⁷ (specialized court devoted to the needs of children who have been identified as victims of commercial sexual exploitation and labour trafficking).
107. In line with the legal standards discussed above, provision of **protection of the child victim during criminal proceedings should be unconditional**, continued throughout the entire duration of proceedings and tailored to the particular physical and psychological needs of the particular victim, with a view to ensuring that the victim can fully recover and receive protection.
108. Protection provided throughout and after the criminal proceedings should be centred on the needs of the child witness and be adapted to the (perhaps changing) protection needs

⁸⁶ Both *op.cit.* footnote 6 and *op.cit.* footnote 34 (CoE Convention against Trafficking) stress that victims' safety and protection needs shall duly be taken into account (Article 6, para 5 and Article. 12 para 2 respectively). *Op.cit.* footnote 34 Article 28 (CoE Convention against Trafficking) specifically stipulates that states shall provide effective and appropriate protection from potential retaliation or intimidation during and after investigation and prosecution of perpetrators for victims, persons reporting criminal offences or otherwise cooperating with the investigating or prosecuting authorities, witnesses and, where necessary, family members of victims and witnesses. Such protection may include physical protection, relocation, identity change and assistance in obtaining jobs. According to Article 28, para 4, protection shall be extended as necessary to members of groups, foundations, associations, or non-governmental organizations which aim at fighting trafficking in human beings or protecting human rights if they assist or support victims during criminal proceedings concerning the offence of trafficking. The two international legislative instruments do not refer to any "conditions" for the provision of such assistance.

⁸⁷ In G.R.A.C.E Court practice, juvenile court judges are instructed that they need to be aware of safety issues that may arise if a case comes before them that involves possible human trafficking activity. For example, the trafficker might be a family member or custodian who may be in the courtroom making a human trafficking victim reluctant to answer certain questions. Judges also need to be thoughtful regarding placement of the child. If a child is placed at home, he or she may be placed where the trafficker resides. If a child is placed in a juvenile detention or residential juvenile facility, he or she might be able to recruit new victims. Dealing with human trafficking victims involves many facets, and juvenile judges are provided information in the Benchbook so they can be aware and on alert as to what they need to consider when dealing with a victim's case. For further information on the G.R.A.C.E. Court please see: <https://www.jud11.flcourts.org/GRACE-Court>.

of the child along the process. Protection should also be available to the child's family, if needed, and the witnesses on their behalf.

109. **In line with international and European legal standards, it is recommended that the State be proactive in ensuring that physical, psychological and emotional protection is available to the victim, free of charge**, throughout the full duration of criminal proceedings to ensure that the victim will not be intimidated, suffer retaliation or other related damage as well as safeguard their dignity.⁸⁸

4.10. Compensation and legal address

110. The Draft Amendments do not make any reference to the issue of free legal assistance with regard to obtaining compensation in relation to child abuse and child sexual exploitation crimes (pecuniary or non-pecuniary). Obtaining compensation is a crucial part of the victim's psychosocial rehabilitation according to international legal standards and should therefore be reflected in the Draft Amendments, in line with the principles below:
111. Child victims of sexual abuse or sexual exploitation have the right to compensation. Compensation entails the reimbursement of material and immaterial damages an abused or exploited child has suffered. Even though no explicit reference to this right can be detected in the Lanzarote Convention, Article 9 of the Optional Protocol makes a direct reference to this right stating that the State "shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible". Article 8 of the Optional Protocol also stresses the need for State Parties to avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims. EU Directive 2011/93/EC Article 20 refers to the right of the child victim for compensation. The European Court of Human Rights in the case of *K.U. v Finland* highlighted that in order for the protection offered to the victim to be practical and effective, the possibility of claiming financial reparation from the perpetrator should be available.⁸⁹ It is finally worth noting that the international and European standards in relation to human trafficking all include references to the right to compensation which include both reimbursement for legal costs as well as amounts for non-pecuniary and other long term pecuniary damages.⁹⁰
112. To ensure effective opportunity to receive compensation for the child victims of sexual exploitation and abuse, accessibility to free legal aid may turn out to play an important role. Thus, **the Draft Amendments should consider introducing provisions for speedy and effective access to free legal assistance, expert legal counselling and legal representation, for the purpose of claiming compensation**, regardless of the form of exploitation or abuse the child has been subjected to. **Further the Draft Amendments should explicitly provide for access of the victim to existing schemes or funds** dedicated to compensation of victims of violent crimes of intent; and in line

⁸⁸ *G.U. v Turkey*, App.No. 16143/10, paras 71-72.

⁸⁹ *Op. cit.* footnote 60 *K.U. v Finland*, para 47.

⁹⁰ See for instance Article 6, para 6 of the Palermo Protocol, Arts.12 and 17 of the EU Anti Trafficking Directive, and Directive 2004/80/EC on compensation to crime victims, para 10 of MC/DC 05/08, and para 123 of the European Court of Human Rights' judgment in *Op. cit.* footnote 52 *Chowdury and Others v Greece supra* highlighting the right of victims to receive compensation from the perpetrators of the offence and establishment of a State victim compensation fund. See also *Op. cit.* footnote 12, para 428, where compensation was awarded to the victim's family as the victim had passed away.

with the European Court of Human Rights' ruling in *Rantsev v Cyprus and Russia*, **compensation for the victim's family** in case the victim has suffered irreparable harm; and finally **establishment of a State Compensation Fund**.

5. FINAL COMMENTS

5.1. Gender-neutral Legal Drafting

113. It is noted positively that overall, the Draft Amendments use gender neutral terminology. Established international practice requires legislation to be drafted in a gender neutral manner.⁹¹ It is recommended that, whenever possible, the reference to post-holders or certain categories of individuals be adapted to use a gender neutral word, whenever possible. Alternatively, the plural form of the respective noun could be used instead of the singular (e.g., [doctors...]) or it is recommended to use both male and female words.⁹²

5.2. Impact Assessment and Participatory Approach

114. It is important to note that new legislation should undergo a consultation process/ in line with OSCE commitments, which require legislation to be adopted "as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (Moscow Document of 1991, par 18.1).⁹³

115. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.⁹⁴ According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, inter alia, the nature, complexity and size of the proposed draft act and supporting data/information.⁹⁵ To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,⁹⁶ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic

⁹¹ See e.g., the United Nations Economic and Social Commission for Western Asia (ESCWA), Gender-Sensitive Language (2013), <https://unswap.unwomen.org/UNEntity/ViewDocument?FileName=Annex16__23201435437.pdf [copy and paste weblink in the browser]>.

⁹² See e.g., OSCE/ODIHR, Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia (October 2014), paras 47-48, <<http://www.legislationline.org/documents/id/19365>>.

⁹⁴ See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

⁹⁵ See e.g., OSCE/ODIHR, Opinion on the Draft Law of Ukraine "On Public Consultations", 1 September 2016, pars 40-41, <<http://www.legislationline.org/documents/id/20027>>.

⁹⁶ See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odihr/119633>>.

governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.⁹⁷ Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.

116. **In light of the above, the Ukrainian legislator is therefore encouraged to ensure that the Draft Act is subject to further inclusive, extensive and effective consultations, according to the principles stated above, at all stages of the law-making process.**

[END OF TEXT]

⁹⁷ *Ibid.*